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Wisconsin. Supreme Court

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WISCONSIN REPORTS

149

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

MARCH 12 — MAY 14, 1912

FREDERIC K. CONOVER
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OF THE

SUPREME COURT OF WISCONSIN

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ERRATA.

Vol. 148.

Page 344, line 26. For *W. D. Thompson*, read *J. C. Thompson*.
" 589, " 4. For 98 Wis. 182, read 92 Wis. 182.

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Gould, Waters, §§ 155, 310, note 7 - - - - - - 320
Id. § 159 - - - - - - 206

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2 Kent, Comm. 298 - - 584

2 Labatt, Master & Servant, p. 1851, sec. 629 - - - 246
Lawson, Presumptive Evidence, 435–439 - - - 214

1 Mechem, Sales, secs. 43–50 - 38
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1 Pomeroy, Eq. Jur. (3d ed.) § 110 - - - - - - 49

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2 Story, Eq. Jur. (12th ed.) § 1201*b* - - - - - 261

5 Thompson, Comm. on Neg. § 5404 - - - - - 460

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Id. § 402 - - - - - 263
Wald's Pollock, Contracts (3d ed.) 199, 200 - - - 485
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1 Wigmore, Evidence, § 238 - 474
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2 Wilcox, Municipal Franchises, § 509 - - - - 518
2 Words & Phrases, 1309 - 78

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CASES DETERMINED

AT THE

January Term, 1912.

HABHEGGER and another, Respondents, vs. KING, Appellant.

February 22—March 12, 1912.

Agency: Employment of physicians for person injured by automobile: Implied authority of minor son: Special verdict: Omitted facts.

1. **A minor son has no implied authority to employ physicians, at the expense of his father, to attend a person run over and injured by the son while using the father's automobile for his own pleasure or convenience, especially where the injury was purely accidental and without fault on the part of the son.**
2. **Sec. 2858*m*, Stats. (Laws of 1907, ch. 346), is not applicable to a matter which the trial court refused upon request to submit to the jury.**

APPEAL from a judgment of the circuit court for Jefferson county: GEORGE GRIMM, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Kading & Kading,* and oral argument by *C. A. Kading.*

For the respondents there was a brief by *Arthur Mulberger* and *R. W. Lueck,* and oral argument by *Mr. Lueck.*

TIMLIN, J. The plaintiffs, suing for medical services performed upon one Richard Karge, had a verdict finding that Charles King, the minor son of defendant, at the time of the accident in which Karge was injured had general permission from his father to run and operate his father's automobile,

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and that the services in question were performed at the request of Charles. It is conceded that this verdict alone would not support the judgment, but it is said that the judgment in favor of the plaintiffs must be taken to find, under ch. 346, Laws of 1907 (sec. 2858*m*, Stats.), either that the defendant authorized Charles to employ the plaintiffs or ratified such employment. But this statute does not apply so far as authorization is concerned, because the defendant requested that that question be submitted to the jury. We do not find any evidence tending to show that Charles King was authorized by the defendant, his father, to employ the doctors for Karge. The latter had been run over and injured in the public street by Charles King while the latter was using his father's automobile for his own pleasure or convenience. It was stipulated on the trial in this case that this was purely accidental and without fault on the part of Charles King. The injured boy was taken to a near-by hospital by the hospital superintendent, who telephoned for one of the plaintiffs, and Charles King took this doctor in his automobile to the hospital, informing him of the occurrence, and while at the hospital requested the doctor to give the injured boy every attention to save his life. He did not attempt to contract on behalf of the defendant nor did the doctors communicate with the defendant at any time before the completion of the services for the value of which this suit is brought. When the injured boy was about to be discharged from the hospital the hospital superintendent, in an interview with defendant, told him that the boy's mother was poor and would probably never be able to pay the hospital charges and requested defendant to do something toward paying the bill, whereupon the defendant paid the hospital bill, informing the superintendent that he was not responsible. The second day after this he received a bill from the plaintiffs for their services. He had heard that doctors were attending the injured boy at the hospital, but did not know they were making a claim against him until he re-

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ceived this latter bill, which he refused to pay. The circuit judge, after submitting the special verdict to the jury, stated that Charles King had no actual oral or written direct authority from his father to employ the plaintiffs for the purpose stated, but that he had implied authority as matter of law. Upon this showing can there be any recovery against the defendant? There is no evidence of ratification and judgment did not go upon that ground.

The law relating to the agency of servants to bind the employer to pay for physicians or nurses in attendance upon persons injured by the negligence of such servants will be found in *Adams v. Southern R. Co.* 125 N. C. 565, 34 S. E. 642, 16 Am. & Eng. R. R. Cases, N. S., pp. 369 to 379, where the cases are collected. Also in *Hanscom v. Minneapolis St. R. Co.* 54 Am. & Eng. R. R. Cases, 226, 53 Minn. 119, 54 N. W. 944, 20 L. R. A. 695. The employment must have been of such nature that this act of the servant is reasonably within its scope, as in the case of a general superintendent of a railway company, general manager or agent, and by some authorities a railroad conductor. *Terre Haute & I. R. Co. v. Stockwell,* 118 Ind. 98, 20 N. E. 650; *Louisville, E. & St. L. R. Co. v. McVay,* 98 Ind. 391. These cases go largely upon the corporate character of the employer, the usual practice pursued, and the great exigency which arises in railroad disasters, and the dangerous character of the business. A mere chauffeur or automobile driver, in a town where the employer is known and can be readily reached by telephone or by other speedy and certain means of communication, would not ordinarily possess such authority. Neither would an infant son using his father's automobile under like circumstances. This follows from the logic of the decisions in *Baker v. Witten,* 1 Okl. 160, 30 Pac. 491; *Malone v. Robinson* (Miss.) 12 South. 709; *Holmes v. McAllister,* 123 Mich. 493, 82 N. W. 220; *Hiroux v. Baum,* 137 Wis. 197, 118 N. W. 533; *Kumba v. Gilham,* 103 Wis. 312, 79 N. W. 325.

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Besides, the stipulation entered into upon the trial, to the effect that the injuries here were the result of mere accident for which the boy in charge of the automobile was not to blame, cut away the groundwork of such implied agency, even if otherwise within the reasonable scope of employment by reason of an implied authority to save the employer from damages caused by the negligence of the employee. *Godshaw v. J. N. Struck & Bro.* 109 Ky. 285, 58 S. W. 781; *Lithgow Mfg. Co. v. Samuel* (Ky.) 71 S. W. 906; *Evans v. Marion M. Co.* 100 Mo. App. 670, 75 S. W. 178; *Cox v. Midland Counties R. Co.* 3 Exch. 268.

The conclusion of the trial court that the boy had in law implied authority to employ physicians at the expense of his father was incorrect and the judgment must be reversed.

By the Court.—Judgment reversed, and the cause remanded with directions to render judgment for defendant.

NORTON, Appellant, vs. CLARK and another, Respondents.

February 22—March 12, 1912.

Gifts inter vivos: *Fraud: Undue influence: Mental capacity: Executors: Action by heir on behalf of estate.*

1. During the last year of his life a testator, by whose will his estate of about $112,000 was divided equally between his wife and daughter, had given to the divorced husband of the daughter about $18,000. Evidence showing, among other things, that after the divorce the donee and his son had continued to live with the testator and his wife, who regarded and treated him as a son and were especially fond of the grandchild, and that after the death of the grandchild the donee made frequent visits to the testator and his wife and, shortly before testator's death and at his urgent request, accompanied them to California and remained with them until testator died, is *held* to sustain findings of the trial court to the effect that the gifts

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were made in consideration of services rendered, gratitude, and affection, and that they were made voluntarily and without any undue influence or fraud on the part of the donee, and at a time when the testator fully understood what he was doing.

[2. Whether in such case, there being an executor appointed and acting in Illinois, the testator's daughter could, without any right of action having been transferred to her in the course of administration, maintain an action, on the ground of fraud, undue influence, and mental incapacity of the testator, to recover for the estate the moneys so given by the testator in his lifetime and to establish a lien therefor on real estate in Wisconsin alleged to have been purchased by the donee with such moneys, is not determined.]

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This is an action by the daughter and one of the heirs of James M. Tenley, deceased, to recover, for the estate, moneys alleged to have been obtained from the deceased by the defendant *George H. Clark* through fraud and undue influence, coupled with a lack of mental capacity on the part of Tenley to dispose of his property, and to declare the judgment recovered a lien on the real estate of the said defendant situated in this state, alleged to have been purchased with the money received from Tenley. The deceased was a resident of Illinois, and his estate is being probated in Fulton county of that state. Plaintiff is a resident of Chicago, and alleges that the executor of the estate refuses to bring any action whatsoever against the defendants; that she and her mother are the only heirs at law and legatees of the deceased; that her mother refuses to join as plaintiff; and that no debts exist against the estate.

The trial court found that no fraud or undue influence was used by the defendant *George H. Clark,* and that the deceased was mentally competent to dispose of his property at the time the gifts, or compensation for services, were made to *Clark.* From a judgment dismissing the complaint on the merits the plaintiff appealed.

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For the appellant there was a brief by *Jeffris, Mouat, Oestreich & Avery,* attorneys, and *Charles J. Trainor,* of counsel, and oral argument by *O. A. Oestreich.*

For the respondents there was a brief by *George G. Sutherland,* attorney, and *Charles E. Pierce,* of counsel, and oral argument by *Mr. Pierce.*

VINJE, J. The defendants claim that plaintiff, being an heir, and there being an executor appointed and acting in Illinois, cannot maintain the action without proof that a right of action has been transferred to her in the course of administration, and, there being no evidence of such transfer, the action should be dismissed. Several other questions also arise as to the right of plaintiff to maintain the action, namely: Can an action to recover personal property, belonging to an estate, in any event be brought by an heir? Can a foreign heir come into the courts of this state to maintain such action, without ancillary administration or the filing of letters testamentary of the executor? We have deemed it best, however, not to decide these questions in this case, but to assume that plaintiff can maintain the action, and dispose of it upon the merits. A valuable note bearing upon the right of next of kin to maintain an action in the interest of the estate may be found in 22 L. R. A. N. S. 454.

In 1886 the plaintiff married the defendant *George H. Clark,* and the issue of the marriage was one son, born in 1889, who died in 1895. *Clark* and his wife resided with Mr. and Mrs. Tenley, the plaintiff's parents, from the time of their marriage until 1893, when *Mrs. Clark* left her husband and went to Chicago to live. In 1902 she obtained a divorce from him and later married one Norton. *Clark* and his son continued to live with the Tenleys, and it appears that both Mr. and Mrs. Tenley considered *Clark* a son and treated him as such, and were especially fond of their grandson. After the latter died, *Clark,* whose business was that of a traveling

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salesman, and who was without much means, continued to make frequent visits to the Tenleys. In 1903 Mr. Tenley suffered a stroke of paralysis, and from that time on till his death in December, 1907, he needed more or less constant care and attention. Late in the fall of 1907 the Tenleys went to California, and *Clark,* upon the urgent request of Mr. Tenley, accompanied them, and remained with them till Mr. Tenley died. He left surviving him his only child, the plaintiff, and his wife, and by will gave one half of his property to each, his estate amounting to about $112,000. Mrs. Tenley also had a considerable separate estate. During the last year of his life, at various times, he gave to *Clark* money and property aggregating approximately $18,000, $6,000 of which represented previous loans made to *Clark* by him.

The trial court found that these gifts were made in consideration of services rendered, gratitude, and affection, and that they were made voluntarily and without any undue influence or fraud on the part of *Clark,* and at a time when Tenley fully understood what he was doing; that in making the gifts he was only carrying out a well-considered and oft-repeated intention to make substantial pecuniary provision for *Clark.* The testimony printed covers nearly 200 pages, and it would serve no useful purpose to give even a synopsis of it. The court has carefully considered the evidence and is persuaded that it sustains the findings made. There is nothing unnatural, suspicious, or unreasonable about the acts of Tenley in giving this money to *Clark* under the circumstances. He regarded him as a son and had been treated as such by him. He had only his daughter and wife dependent upon him, and the latter had considerable property of her own. His property amounted to about $130,000. Of this he gave $18,000 to *Clark,* who had been a son to him from 1886 to the time of his death, and the balance in equal shares to his wife and daughter; certainly a very fitting disposition of it. Cases like *Davis v. Dean,* 66 Wis. 100, 26 N. W. 737; *Cooper v.*

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Reilly, 90 Wis. 427, 63 N. W. 885; *Cole v. Getzinger,* 96 Wis. 559, 71 N. W. 75; *Doyle v. Welch,* 100 Wis. 24, 75 N. W. 400; *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939; *Boyle v. Robinson,* 129 Wis. 567, 109 N. W. 623; *Quinn v. Quinn,* 130 Wis. 548, 110 N. W. 488; and *Schumacher v. Draeger,* 137 Wis. 618, 119 N. W. 305, cited by the plaintiff, do not apply to the present case. In each of those cases the donor parted with the bulk or the whole of his property to a donee who did not stand as near to him as, or at least no nearer than, others who were excluded from his bounty. Hence the transaction itself bore more or less upon its face the evidence of undue influence or mental unsoundness, or both, and invited the closest scrutiny. Not so here. Under all the circumstances shown by the evidence, Tenley made a rational and paternal disposition of his property—just such a disposition as a man of sound business sense in whom the instinct of love, affection, and justice was active, would make.

By the Court.—Judgment affirmed.

FIRST NATIONAL BANK OF EDGERTON, WISCONSIN, Respondent, vs. BIEDERMAN, Appellant.

February 22—March 12, 1912.

Chattel mortgages: Filing: Mortgagors living in different towns: Validity of unfiled mortgage: Actual notice.

1. A chattel mortgage given by partners, one of whom resides in a city and the other in a town, is not duly filed under sec. 2314, Stats. (1898), unless filed in the office of the city clerk and also in that of the town clerk.
2. Under sec. 2313, Stats. (1898), if possession of the property is not delivered to the mortgagee, a chattel mortgage not filed as provided in sec. 2314 has no validity as against subsequent purchasers or mortgagees, even though they had actual notice of it.

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APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

This is a contest between two chattel mortgagees of a quantity of tobacco. No detailed statement of the case is necessary. The facts on which the case depends are simple. February 22, 1907, S. F. and T. M. Madden, copartners dealing in leaf tobacco at the city of Edgerton, gave to the plaintiff a chattel mortgage upon a quantity of leaf tobacco in their warehouse to secure payment of two promissory notes of $2,500 each. T. M. Madden then resided in the city of Edgerton, and S. F. Madden in the adjoining town of Fulton. On the same day the mortgage was duly filed in the proper office in the city of Edgerton, but was never filed in the town of Fulton. January 11, 1908, the Maddens gave a second chattel mortgage covering the same tobacco and a large amount of other tobacco to the Bank of Marshall and the defendant *Biederman* jointly to secure a note of $5,000 to the bank and a note of $10,500 to *Biederman.* There was no exception in the granting clause of this latter mortgage, but in the clause guaranteeing title in the mortgagors and freedom from incumbrances an exception is made as follows: "except a mortgage upon 917 bundles packed in cases to *First National Bank of Edgerton* for $5,000, filed in city clerk's office of Edgerton February 22, 1907." On the 13th of March, 1909, none of the aforesaid debts having been paid, the Maddens executed and delivered new mortgages as follows: to the plaintiff a mortgage covering the same tobacco covered by its mortgage of February 22, 1907, and to secure the same debt; to the defendant *Biederman* a mortgage covering the entire crop of 1906, and including the tobacco mortgaged to the plaintiff, to secure the aforesaid existing debt of $10,500; to the Bank of Marshall a mortgage covering the same property last described to secure the aforesaid existing debt of $5,000. No exception was inserted in either of the last named mortgages, and no mention made of the plaintiff's mortgage. The two mort-

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gages last named were at once duly filed in both the city of Edgerton and the town of Fulton, and two hours later the plaintiff's new mortgage was filed in the city of Edgerton, but there is no evidence that it was ever filed in the town of Fulton. In August, 1909, the defendant and the Bank of Marshall seized the entire quantity of tobacco covered by their mortgages, and sold the same, including the tobacco mortgaged to the plaintiff, from which last named tobacco they realized the sum of $2,680.63, which sum was deposited in court to abide the result of this action. The defendant *Biederman* has succeeded to all the rights of the Bank of Marshall.

The case was tried without a jury, and the trial court found the foregoing facts, and further found that at the time of the execution of the last named mortgages on March 13, 1909, the defendant *Biederman* and the Bank of Marshall knew that the plaintiff's claim had not been paid, and that it was the intention of the Maddens to continue in their mortgages the priority of the plaintiff's lien, but that the scrivener by mistake omitted to insert the proper exception or reservation in their mortgages.

On these facts the circuit court concluded that the mortgages executed to the defendant *Biederman* and the Bank of Marshall did not convey any interest in or lien upon the property described in the plaintiff's mortgages as against the plaintiff, and entered judgment awarding to plaintiff the sum deposited in court, with interest. From this judgment *Biederman* appeals.

For the appellant there were briefs by *F. W. Hall* and *Jeffris, Mouat, Oestreich & Avery,* and oral argument by *Mr. Hall* and *Mr. L. A. Avery.*

L. E. Gettle, for the respondent.

WINSLOW, C. J. The plaintiff's mortgage of February 22, 1907, was filed only in the city of Edgerton, and hence, owing to the fact that one of the mortgagors resided in the town of

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Fulton, it was never properly filed as required by sec. 2314, Stats. (1898). The plaintiff's second mortgage of March 13, 1909, was filed in the city of Edgerton, two hours after the second mortgage of the defendant *Biederman,* and hence must be regarded as subordinate thereto even had it been duly filed; but as there is no evidence to show that it was ever filed in the town of Fulton, and it appears that *Biederman's* mortgage was duly filed in both city and town, it is clear that the plaintiff can claim nothing under it as against *Biederman.* In fact the plaintiff's counsel makes no claim under the second mortgage, but only claims under the first mortgage, and very frankly admits in his brief that because of the failure to properly file that mortgage the plaintiff's rights are only those of the holder of an unrecorded mortgage.

Having only these rights, the respondent's argument is that by accepting their mortgage of January 11, 1908, containing the exception in favor of the plaintiff's prior mortgage, *Biederman* and the Bank of Marshall acquired only a mortgage upon the equity of redemption in the tobacco previously mortgaged to the plaintiff, and that they secured no greater rights under their mortgages of March 13, 1909, given to secure the same debt, because they had notice of the unrecorded mortgage and therefore were not subsequent purchasers or mortgagees for value in good faith.

Without deciding the question it may be admitted, for the purposes of the case, that by reason of the exception contained in the defendant's mortgage of January 11, 1908, he acquired by that mortgage no interest in or lien upon the tobacco previously mortgaged to the plaintiff except a lien in the equity of redemption after the plaintiff's claim should be satisfied.

But conceding this to be the situation when that mortgage was given and up to the time of the execution of the mortgage of March 13, 1909, we have yet remaining the question of the effect of this later mortgage which contained no exception. In terms it covered the whole property. It was unquestion-

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ably a lien upon the whole property and a first lien thereon, unless the fact that the defendant knew of the existence of the plaintiff's unrecorded and unpaid mortgage prevents him from claiming any lien prior to that of the unrecorded mortgage. To put the matter in simpler form, the question is whether failure to file a chattel mortgage can only be taken advantage of by subsequent purchasers or mortgagees in good faith, or whether persons dealing with the property with notice can also take advantage of it. The section itself (sec. 2313, Stats. 1898) seems very plain and unmistakable. It says that no chattel mortgage "shall be valid against *any other person than the parties thereto*" unless the possession of the property be delivered and retained or the mortgage duly filed.

There is no room for interpretation or construction here. The words are definite and the meaning certain,—"any other person than the parties" can mean but one thing, and the court is not at liberty to construe it to mean anything else.

In the majority of states notice of an unrecorded mortgage will deprive a subsequent purchaser or mortgagee of any protection under the filing act; he will take subject to the rights of the holder of the unrecorded mortgage. In Wisconsin, however, unrecorded mortgages have no validity as against subsequent purchasers or mortgagees, even though they have actual notice of them. Jones, Chat. Mortg. (5th ed.) secs. 313, 314. This has been squarely decided by this court. *Parroski v. Goldberg,* 80 Wis. 339, 50 N. W. 191; *Ryan D. Co. v. Hvambsahl,* 89 Wis. 61, 61 N. W. 299; *Dornbrook v. M. Rumely Co.* 120 Wis. 36, 97 N. W. 493. In *Manson v. Phœnix Ins. Co.* 64 Wis. 26, 24 N. W. 407, language which seems to indicate a contrary view was used, but the question there was simply whether an unrecorded mortgage was valid as between the parties. The question at issue in *Ullman v. Duncan,* 78 Wis. 213, 47 N. W. 266, was as to the construction of sec. 2315, Stats. (1898), with regard to the failure to file an affidavit of renewal, and by the very terms of this lat-

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ter section the only persons protected are "subsequent purchasers or mortgagees in good faith."

It seems unquestionable that our filing statute makes sharp practice possible and enables one who has full notice of a previously unrecorded mortgage to purchase the property, or to take a mortgage thereon to secure a pre-existing debt or one presently created, with the deliberate purpose of cutting off the unrecorded mortgage. The idea of the statute doubtless is that it is better to have the statute certain and effective than it is to leave the question in each case to depend on notice or good faith, and thus afford opportunity for conflicts in oral testimony and offer a reward to active and fertile memories.

The defendant had a right to take additional security if he could get it. He obtained such a security in the chattel mortgage which was given to him on March 13, 1909. That mortgage never has been reformed and doubtless could not be reformed in this action. There are no elements of estoppel here because the plaintiff has made no change of position relying on any act of the defendant. Under the terms of the chattel mortgage law the defendant was entitled to the money deposited in court.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the defendant in accordance with this opinion.

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MINEHAN, Respondent, vs. MURPHY and another, Appellants.

February 23—March 12, 1912.

Waters: Dams: Artificial condition may become natural: Lake or river? Question for jury: Evidence.

1. **The artificial condition of a lake or stream, originally created by a dam, may by lapse of time become a natural condition.**
2. **Evidence showing, among other things, that a dam built fifty years ago across a small, unmeandered, unnavigable creek connecting two lakes had created navigable water between it and the upper lake and had raised the level of that lake; that between the dam and the upper lake the water retained many of the characteristics of a river, its course being winding, its width varying from sixty to several hundred feet, and there being at all times a perceptible current; and that there was but a narrow navigable channel which was kept open largely by the passing of small boats and launches, is *held* to sustain a verdict to the effect that such navigable water was a river, not a lake.**

APPEAL from a judgment of the county court of Dodge county: FRANK M. LAWRENCE, Judge. *Affirmed.*

Action in ejectment. The pleadings raised the question of whether the bed of the navigable water which bounded plaintiff's land was that of a lake or that of a river. She claimed that it was the latter and that she had title thereto, incidental to her title to the bank, subject to ordinary public rights in such waters, and so defendants, who adversely to her occupied a part of such bed on her side of the center line of the stream, were liable in the action. They claimed the *locus in quo* to be bed of a lake and therefore that plaintiff's riparian right was not such as to enable her to maintain ejectment.

The evidence established, or tended to establish, this: Plaintiff had sufficient title to enable her to maintain ejectment, if the *locus in quo* was river bed, otherwise not. Her title was based on a chain of conveyances reaching back to a remote grantee, her western boundary being described as the

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center line of the creek. That, in a state of nature and when the United States parted with title to the land, was a small, unmeandered, unnavigable rivulet, about three miles long, connecting Fox lake with Beaver Dam lake in Dodge county,—the latter lake being the lowest. The land in question was a short distance below the outlet from the Fox lake basin and on the left bank of the creek. Some fifty years ago a fourteen-foot dam was constructed across the creek, which created navigable water therefrom to the lake and raised the lake level. The artificial navigable water retained much of the characteristics of a river. It was of varying width, from several hundred feet down to sixty or less. There was but a narrow navigable channel which was kept open largely by the passing of small boats and launches. There was, at all times, a perceptible current,—more when the gates at the dam were opened than otherwise. The course from the outlet of the conceded lake to the dam was of winding character and more like that of a river than that of a lake. Plaintiff, for years, had claimed title as if the water was that of a navigable stream. There were many boat houses opposite her shore line, the proprietors of which located them with her permission and paid for the privilege of occupancy. The particular place was taken possession of by defendants' predecessor under contract with the plaintiff.

Defendants' counsel moved the court for a directed verdict. The motion was denied. The cause was submitted to the jury under instructions which were not excepted to. Some requests were made for instructions by defendants' counsel, which were refused, and the rulings duly excepted to. The jury found for plaintiff and judgment was rendered accordingly.

For the appellants there was a brief by *W. C. North* and *Burke & Lueck,* and oral argument by *M. E. Burke.*

For the respondent there was a brief by *Kading & Kading,* and oral argument by *C. A. Kading.*

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MARSHALL, J. The court instructed the jury, in effect, that, if the artificial condition mentioned in the foregoing statement had existed, before the commencement of the action, for the full period requisite to divest title to the real estate from one and vest it in another by the law of adverse possession, and the *locus in quo* was bed of a navigable lake rather than of a navigable river, the former private title had become vested in the state the same as that of natural lakes, and if such *locus in quo* was bed of a navigable stream, the former private title had become changed to the same character of qualified title as that of riparian proprietors to the beds of navigable rivers in general. That was good law as conceded by counsel on both sides. The court gave it as settled by the decisions of this court, following the letter and logic, particularly, of *Smith v. Youmans,* 96 Wis. 103, 70 N. W. 1115; *Pewaukee v. Savoy,* 103 Wis. 271, 79 N. W. 436; *Diana S. Club v. Lamoreux,* 114 Wis. 44, 89 N. W. 880; *Johnson v. Eimerman,* 140 Wis. 327, 122 N. W. 775.

In the last case cited the court, speaking by Mr. Justice BARNES, said with reference to a long existing artificial condition, as in this case: "The artificial condition originally created by the dam became by lapse of time a natural condition." In *Diana S. Club v. Lamoreux,* speaking on the same subject, it was said: "By operation of the statute of limitations the artificial condition is thus stamped with the character of a natural condition, and the title to the lands covered by the waters of the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes."

The law having been thus given to the jury with instructions, which are not complained of, as regards the distinction between a lake and a river, leaving to the jury merely the question of determining from the evidence the ultimate fact in controversy, counsel make no serious complaint, as we understand it, except in so far as the court failed to hold that there

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was no jury question in respect to the matter on the evidence. The point was raised that there was no such question by motion to direct a verdict as well as by the several requests for instructions. No special attention need be paid to the requests as they involve the same subject as the motion.

The statement of facts sufficiently meets the contention that there was no jury question as to whether the body of water was that of a lake. It is there said, in effect,—and we repeat it,—there was competent direct evidence and there were evidentiary circumstances tending to show that the disputed premises were in the waters of a navigable river. So long as there was evidence, circumstantial and direct, or either, tending to prove that such was the fact, the question was for jury solution as to whether it did so efficiently or not. Hence the result must be affirmed.

By the Court.—So ordered.

The following opinion was filed March 16, 1912:

TIMLIN, J. I do not wish to be counted as assenting to the *dictum* hereinafter mentioned contained in the opinion in this case and some other cases.

I find nothing to criticise in the words "the artificial condition originally created by the dam became by lapse of time a natural condition." These words are to my mind proper to describe a situation whereby riparian owners and others by long acquiescence and user became entitled to have the easement of overflow continued, their right to reach the water continued, and the water continued at its height and in the condition in which it was kept for more than twenty years as against any one who would, by draining the lake or pond or by other material interference, destroy the easement or render less available or valuable the riparian rights. But I do not agree that the title to the lands covered by water raised by a dam in a river is deemed to have changed from private

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ownership to ownership by the state, even where that river is the outlet of a lake and the raised water reaches back to the level of the waters of the lake. The person erecting and maintaining the dam acquires by condemnation or adverse user an easement to overflow such lands. If by purchase or in consequence of a particular statute he should acquire title for that purpose, he, and not the state, succeeds to the private ownership of the person whose title he has acquired. But where he acquires an easement the former proprietorship continues subject to the easement. Under the *dictum* stated in this and the other cases referred to in the opinion, the owner of the land subject to the easement of flowage is to be cut off by a supposed adverse possession which never existed. The state has in fact made no claim to the land. Neither has there been a day in which the owner of the submerged land could have brought an action against the state to assert his title, for the reason that the state was not in possession or making any claim, and for the further reason that the legislature has not authorized any such suit against the state. There is no statute giving the state title under such conditions, and if there were it would be unconstitutional. The power to create limitations of this kind is legislative, not judicial. *Missouri v. Illinois,* 200 U. S. 496, 520, 26 Sup. Ct. 268. Long before the XIVth amendment to the constitution of the United States was adopted forbidding any agency of the state, legislative or judicial, to deprive any person of his property without due process of law, it was decided by the supreme court of the United States in *Webster v. Cooper,* 14 How. 488, that a legislative act making the seisin of the occupant adverse as against one who had no legal right to bring an action, was invalid as taking away the property of one man and vesting it in another. The *dictum* here criticised would take away the property of one man and vest it in the state. See, also, *Pratt v. Churchill,* 42 Me. 471; *Wass v. Bucknam,* 38 Me. 356; *Adams v. Palmer,* 51 Me. 480; *Forster v. Fors-*

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ter, 129 Mass. 559; *Christmas v. Russell,* 5 Wall. 290, 300. There must be some time within which the landowner could have brought an action and he must have neglected during that time to do so. To attempt to take his property arbitrarily and vest it in the state merely because some other person has been twenty years in uninterrupted enjoyment of an easement thereon, seems to me very obviously unsound and unconstitutional. *Terry v. Anderson,* 95 U. S. 628; *McGahey v. Virginia,* 135 U. S. 662, 705 *et seq.,* 10 Sup. Ct. 972.

I am authorized to add that Mr. Justice KERWIN concurs in the foregoing.

MARTIN and others, Respondents, vs. BOARD OF DIRECTORS OF THE GERMAN REFORMED CHURCH OF PEACE OF WASHINGTON COUNTY and others, Appellants.

February 23—March 12, 1912.

Religious societies: Property held in trust: Title: Possession and control: Diversion to other uses: Injunction: Incorporation of society: Denominations: Independent or Reformed church? Trial: Findings of fact: Appeal.

1. Where property is conveyed to a religious society, or to trustees for its use, for the promotion of the doctrines and discipline of some particular denomination, courts will prevent its diversion to the support of a different and inconsistent denomination, if even a single individual legally interested objects.
2. The fact that the society was not incorporated at the time the property was granted to it does not impair the trust thereby intended, if the legal title was granted to the trustees or members of such society.
3. A conveyance of land for church and cemetery purposes to "The Trustees of the Protestandisch Evangelisch Church and their successors in office" constituted a definite and clear grant of the property to the organization so named, and upon its subsequent incorporation the title vested in the trustees in trust for the uses and purposes for which it was conveyed and held before such incorporation.

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4. The evidence in this case (stated in the opinion) is *held* to show, contrary to the findings of the trial court, that the church society of which the defendants are officers was organized and has continued to the present time as an independent religious organization; that it received grants of its property for a church, a cemetery, and a parsonage as such an independent society, and holds the same in trust for such uses; that it was at no time a Reformed church, and did not become legally affiliated with the Milwaukee Classis of the Reformed Church; and that the management and control of the temporalities are vested in its board of trustees and the members of the congregation, pursuant to its articles of incorporation.
5. Evidence included in numerous paragraphs designated as findings of fact by the trial court is merely surplusage and will be disregarded as findings, only the ultimate facts found being so considered.

APPEAL from a judgment of the circuit court for Washington county: JOHN K. PARISH, Judge. *Reversed.*

Action by plaintiffs to restrain the trustees and officers of the Church of Peace of Washington County from diverting the uses of the church property. The court made findings of facts and conclusions of law in favor of the plaintiffs, and filed a memorandum of the decision of the court which contains the following:

"That the plaintiffs are entitled to the relief demanded in their complaint; that the defendant church is and has been a German Reformed Church; that the defendants and each of them is a member of the German Reformed Church; that the church is and has been a member of the Milwaukee Classis of the Synod of the Northwest; that the *Rev. Zenk* is the legal minister and pastor of said church; that the property described in the plaintiffs' complaint belongs to the congregation of the German Reformed Church of Peace and is held by the congregation as such; that the doctrines of said Church of Peace as taught therein for upwards of forty years have been and are the doctrines of the German Reformed Church and that no doctrines of any other church have been promulgated therein; and that none but a German Reformed minister of said Synod is authorized or empowered to minister to said congregation in its church edifice."

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This is an appeal from the judgment entered in accordance with such findings and conclusions of law.

For the appellants there was a brief by *O'Meara & O'Meara,* attorneys, and *A. J. Schmitz,* of counsel, and oral argument by *Mr. P. O'Meara, Mr. Thomas O'Meara,* and *Mr. Schmitz.*

For the respondents there was a brief by *Boden & Beuscher,* and oral argument by *F. X. Boden.* They cited, among other authorities, *Greek C. Church v. Orthodox G. Church,* 195 Pa. St. 425, 46 Atl. 72; *Roshi's Appeal,* 69 Pa. St. 462, 8 Am. Rep. 275; *McGinnis v. Watson,* 41 Pa. St. 9; *Sutter v. First R. D. Church,* 42 Pa. St. 503; *Kniskern v. Lutheran Churches,* 1 Sandf. Ch. 439; *Walker v. Cuthbert,* 10 Ala. 213; *Att'y Gen. v. Dublin,* 38 N. H. 459; 2 Am. & Eng. Ency. of Law (2d ed.) 24, 352–3; *Kuns v. Robertson,* 154 Ill. 394, 40 N. E. 343; *Hale v. Everett,* 53 N. H. 10; *Marien v. Evangelical C. Cong.* 132 Wis. 650, 113 N. W. 66.

SIEBECKER, J. This is a contest between two factions of a church congregation over the possession and control of the church property. *Rev. William C. Zenk,* who had been and at the time the action was commenced claimed still to be the pastor, was made a party plaintiff by order of the court, and he and the other plaintiffs represent one of the factions. They claim that this church congregation is a religious organization of the Reformed Church. The defendants are the trustees and officers of the congregation and are allied with the faction which asserts that the congregation is an independent one.

The complaint alleges that the defendant congregation is a member of the religious organization known as the Reformed Church of the United States, and, as such member, is under the control and jurisdiction of the ecclesiastical judicatories of this church. These are the Milwaukee Classis, the Synod of the Northwest, and the General Synod of the United

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States. On the ground that the property of the defendant congregation is held in trust for the use of the Reformed Church organization the plaintiffs seek to restrain the defendants from diverting the property of the congregation to the uses and religious purposes of an independent church, freed from the control of the superior bodies in the Reformed Church of the United States; from devoting it to the teaching of religious beliefs, customs, and systems of church government which are foreign to and in conflict with the ecclesiastical and religious teachings and the rules and regulations of the Milwaukee Classis of the Reformed Church; from engaging a pastor of any other denomination; from ejecting *Rev. Zenk* from the parsonage; from interfering with him in the use of the church for religious purposes; and from demanding the surrender of the keys and the church building to them.

The answer of the defendants denies that the church is a member of the organization known as the Reformed Church in the United States and that it is subject to the control or supervision of any superior religious body, and alleges that the congregation was organized as an independent, voluntary, religious organization and that the temporalities of the church are subject to their unrestricted control, as the trustees of the church organization, under the authority of the congregation and its articles of incorporation.

The following facts are without dispute in the evidence: In 1850 a voluntary religious organization was formed by German residents of the towns of Jackson and Polk in Washington county. This organization was known and designated as the Evangelical Protestant Church. In 1851 the society acquired by warranty deed lands for cemetery and church purposes, the grantee being designated as the "Trustees of Protestandisch Evangelisch Church and their successors in office." In April, 1852, a constitution was adopted by the society, the first article of which provides that the cemetery and the church shall forever remain the inalienable property

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of the "Evangelical Protestant United Congregation." The articles also provide that the first article shall not be amended, and that two thirds of the congregation shall be present to amend the other articles of the constitution. In 1859 the society voted to incorporate, the resolution adopted by the congregation providing that the society should not join a synod unless all the members should unanimously consent thereto. In accordance with the law of that time incorporation was duly made, the society adopting the name of "The Church of Peace of Washington County." In 1870 land was conveyed to the society for a parsonage, the grantee being designated as "The Trustees of the Protestandisch Evangelisch Church and their successors in office." In 1873 a provision was inserted in the first article of the constitution providing that the parsonage premises, with the cemetery and church property, should forever remain the inalienable property of the Evangelical Ref. Protestant Congregation. There was evidence before the trial court suggesting the inference that the abbreviation "Ref." had evidently been inserted subsequent to the writing of the instrument. The ink used and the handwriting were different from the rest of the instrument. This amended constitution contains the provision of the former constitution that the constitution could be amended, but that two thirds of the congregation should be present. In 1882 an amended constitution was prepared and was signed by members of the congregation, but the records of the church do not show that any notice was given of a meeting to pass upon it, that there were two thirds of the members present, that it was considered, or that it was adopted by the congregation. In 1887 an alleged amendment to the articles of incorporation was recorded. Objection was made to the introduction in evidence of this purported amendment on the ground that it was not an amendment to the articles. It is not acknowledged, and there is no evidence in the records of the congregation of its having been adopted by the congregation

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or authorized by it. In this writing the name of the church was changed from "The Church of Peace of Washington County" to "The German Reformed Church of Peace." Obviously, this did not effect an amendment to the articles of incorporation.

There was evidence before the court that soon after the Reformation the main branches of the Protestant Church in Germany were the Lutheran and Reformed churches; that the main difference between these churches was in regard to the doctrine of the Holy Communion; that in 1817 the King of Prussia attempted to unite these two churches under the name of "The Evangelical United Church;" that this attempt resulted in the creation of a new church organization; and that the old organizations still persisted. There was also evidence that in this country the name "Evangelical Protestant Church" would mean the same to Germans as "Evangelical Protestant United Church," and that the churches using either of these names in this country were generally known as "Evangelical Churches."

From the time of its organization in 1850 up to 1867 or 1868 the church here in question was served by pastors of no one denomination. Two of them are said to have been members of either the Lutheran or the Evangelical Church, one was an Episcopalian, and one was of unknown denomination. Since 1867 or 1868 all of the pastors have been members of the Reformed Church. With the exception of two years, when he was absent on account of illness, Rev. F. P. Leich served as pastor of the congregation from 1870 to 1900. Until 1878 or 1880 the congregation had no relation with any synod or other judicatory of any church organization. At this time Rev. Leich and two church members were in attendance at a meeting of the Milwaukee Classis of the Reformed Church, and he then made application for the admission of the congregation to the Milwaukee Classis. No action had

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been taken by the congregation authorizing this application, but Rev. Leich testified that he had spoken to members of the congregation stating what he purposed to do, and that no objection was made thereto. No action was thereafter taken by the congregation ratifying this action, but the society did contribute money from funds of the church to the classis and delegates were elected to attend meetings of the classis. Several times the classis met in the church of this society. In 1904 trouble arose between the pastor, Rev. Dyken, and certain members of the church organization. This trouble ultimately resulted in the expulsion of two members of the congregation, an appeal by them to the classis, a reversal by the classis of the order of expulsion, and the adoption at an annual meeting of the congregation of a resolution severing all relation with the classis. Early in 1907 *Rev. Zenk* was unanimously elected by the congregation as pastor. In the fall of the same year, at a meeting of the congregation, a resolution was adopted terminating his pastorate, and thereafter attempts were made by the trustees to obtain possession of the church properties. As heretofore stated, this action has for its purpose the restraining of all such attempts.

The issues raised present the question of whether or not the defendants and the members of the society co-operating with them are diverting the church property and its temporalities from the uses to which they are limited by the grants of the properties and the rules and regulations of the church organization when the properties were acquired. As stated in *Franke v. Mann,* 106 Wis. 118, 81 N. W. 1014, in adopting the language used in *McBride v. Porter,* 17 Iowa, 203:

"The grantees take the title thereof subject to this limitation, and it is not in the rightful power of the minority, or of the majority, or even of the whole congregation, to divert the property from the use and trust for and with which it was conveyed. . . . The court will look to the trust specified and intended, and must disregard all questions as to majority or

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as to religious creed and belief except so far as shall be necessary to ascertain the trust intended and the application of the property accordingly."

It has also been declared:

"When such use is for the promotion of the doctrines and discipline of some particular denomination, courts will prevent diversion to the support of a different and inconsistent one, if even a single individual legally interested objects." *Cape v. Plymouth Cong. Church,* 130 Wis. 174, 180, 109 N. W. 928, and cases there cited.

The fact that this church society was not incorporated at the time the land for a church building and a cemetery was granted to it does not impair the trust thereby intended, if the legal title was granted to the trustees or members of such voluntary society. *Fadness v. Braunborg,* 73 Wis. 257, 41 N. W. 84. As heretofore stated, the grant of the land in 1851 for church and cemetery purposes was to "The Trustees of the Protestandisch Evangelisch Church and their successors in office." This makes a definite and clear grant of the property to this organization, and under the incorporation of 1859, pursuant to the statutes, empowered the trustees, as the trustees of an unincorporated society, "to take into their possession and custody all the temporalities of such church, congregation, or society, whether the same may have been given, granted, or devised, directly or indirectly, to such church, congregation, or society, or to any other person or persons for their use." *Fadness v. Braunborg, supra.* Under the circumstances, it follows that the title to whatever property had been granted to this church, or acquired by it prior to the incorporation in 1859, vested in the trustees in trust for the uses and purposes for which it was conveyed and held before such incorporation.

The conveyance was to "The Trustees of the Protestandisch Evangelisch Church and their successors in office." It therefore is to be determined whether the purpose and intent

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of the members of this church organization was to organize an independent religious body or one connected with and forming part of other and superior bodies or judicatories, such as the classis and synod of the Reformed Church of the United States. The trial court found that this congregation or church society was organized as a Reformed Church congregation and that it was a member of the Milwaukee Classis and of the Synod of the Northwest of the Reformed Church of the United States. These are the only ultimate facts found, and the action of the court in including the evidence in sixty separate paragraphs, designated as findings of fact, was mere surplusage and they must be disregarded as findings. We have heretofore set out the undisputed facts, which are the facts upon which the litigated questions turn. From these it appears that the society in its constitution of 1852 did in form declare that its property should remain inalienably in the ownership of the Evangelical Protestant United Congregation, that any person residing within the prescribed limits and professing the Evangelical Protestant religion should be eligible to membership upon contributing to the support of the church in the manner provided, and that all members should stand upon an equality of right as to the privileges and benefits of the organization. The evidence shows that the church government was vested in the congregation and its board of trustees, and that the board was elected by the members of the church at stated meetings for prescribed terms of office. In the administration of its religious and temporal affairs, from its inception, the congregation acted independently of any other organization. At a meeting of the congregation in 1859, at which it was decided to incorporate the society, a resolution was adopted declaring that the society was not to join any synod unless all the members should unanimously consent thereto. It also appears that the congregation called and accepted ministers affiliated with various Protestant sects, and that after 1867 or 1868 ministers of the Reformed

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Church were engaged. We are unable to perceive how, in the light of these undisputed facts, it can be held, as found by the trial court, that the court was organized as a Reformed church. The fact as found by the circuit court, that many of the members of the society were adherents to the tenets of the Reformed Church, cannot control, for it also appears that many of the members were not of this persuasion. As stated by one witness, many sects were represented in the membership, and moreover, after 1852, by constitutional provision, admission to membership was to be passed upon solely by the trustees, if the applicants professed the Evangelical Protestant religion as declared in article 1. This certainly cannot, under the evidence adduced, be held to have restricted membership to those who professed the tenets of the Reformed Church of the United States. It appears that from 1867 or 1868 to the time of the commencement of this action only ministers of the Reformed Church were engaged, that they and others of this denomination dedicated the new church building, employing the ritual and service of this denomination; that in 1878, while the pastor and two members of the church attended the meeting of the Milwaukee Classis of the Reformed Church, the pastor made application to join this classis and that the application was granted; that the congregation, however, at no time prior or subsequent thereto, authorized or ratified joining this classis, though it contributed money for its support and selected delegates to attend its meetings. It is true that from the time religious services were held by the congregation it used the Heidelberg Catechism and much of the ritual and the service books of the Reformed Church. All these facts and circumstances, however, did not operate to effect an organization of a Reformed church or to change it from an independent church to one connected with the Reformed Church. It is manifest that these matters could be adopted by the congregation, if it so desired, within the purposes of its independence. If it had been pur-

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posed to thereby change from the original independent organization to membership in the classis and synod of the Reformed Church, the object would have failed in law, because that would amount to a diversion of the use of the church property from the trust imposed on it in the grant to the independent society, which received and held it in its corporate capacity.

We consider that the record clearly shows that this church society was organized and has continued to the present time as an independent religious organization; that it received grants of its property for a church, a cemetery, and a parsonage as such an independent society, and that it holds the same in trust for such uses; that the society was at no time a Reformed church and that it did not become legally affiliated with the Milwaukee Classis of the Reformed Church; and that the management and control of the temporalities are vested in its board of trustees and the members of the congregation, pursuant to its articles of incorporation. The evidence shows that the plaintiff *William C. Zenk* was by a majority vote of the congregation removed from the pastorate of the congregation and that he wrongfully withheld from the trustees the possession of the parsonage property, the key to the church, and that he and the plaintiffs wrongfully assert control over the temporalities of the church and have prevented the trustees from exercising an undisturbed control over the same. We are of the opinion that the plaintiffs have established no cause of action and that their complaint must be dismissed.

The defendants are entitled to judgment upon their counterclaim, adjudging that the religious organization of this church is an independent one; that they are entitled to possession of the temporalities of the church, freed from molestation and interference, and to be held by its board of trustees under the authority vested in them by the articles of incorporation and religious organization; that *William C. Zenk* was

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duly discharged from the pastorate of the church by a vote of the congregation; and such further relief as may be necessary to enforce the rights of the trustees of the church and the congregation, pursuant to the views expressed in this opinion.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the trial court with directions to enter judgment dismissing plaintiffs' complaint, and to award judgment in defendants' favor on the counterclaim, as indicated in the opinion. No costs are to be allowed to either party. The plaintiffs are to pay the clerk's fees in this court.

JONES, Respondent, vs. HOFFMAN and another, Appellants.

February 23—March 12, 1912.

Deeds: Construction: Reservation or exception? Intention of parties.

1. The words "excepting" and "reserving" in deeds are often used indiscriminately and interchangeably, and sometimes what purports to be a reservation has the force of an exception, the technical meaning giving way to the manifest intention of the parties.
2. In a deed conveying forty acres of land, a clause "reserving off the east line of the same two rods in width, running into Pewaukee lake, commencing two rods south of the northwest corner of section 24," followed immediately by a reservation of a right of way over another strip to be used by the parties in common, is *held*, in view of the physical situation and surrounding circumstances, to have excepted the strip first mentioned from the grant.
3. Language used in subsequent conveyances from the grantee in said deed, referring to said first mentioned strip as a right of way, could not enlarge the estate granted to him by such deed.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

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This action was brought to quiet title and declare plaintiff the owner of the land in question and bar and foreclose the defendants from any claim, right, or title to said land adverse to the plaintiff. The defendants claim title through mesne conveyances from plaintiff under a deed containing the following:

"Reserving off the east line of the same two rods in width, running into Pewaukee lake, commencing 2 (two) rods south of the northwest corner of section 24; also a right of way from the southeast corner of the above described lot, thence running south along the east line of the southeast quarter (¼) of said northeast quarter (¼) of section 23 aforesaid, into the present track used by the parties of the first part."

The defendants also claim title by adverse possession under a written instrument.

The court made the following findings: That the plaintiff is the owner in fee simple and is now and has been in possession of the strip of land described in the complaint since he acquired full title to said strip, together with other real estate, by warranty deed from John C. Jones, bearing date October 3, 1867, which deed was recorded in volume 37 of Deeds, page 242, in the office of the register of deeds of Waukesha county, Wisconsin; and the court further finds in connection therewith that in the deed bearing date December 10, 1868, from *William C. Jones,* this plaintiff, and wife, to D. G. Ormsby, which deed was recorded in the office of the register of deeds of Waukesha county, Wisconsin, on the 17th day of October, 1871, in volume 43, page 532, it was the clear intention of the parties to said deed to except the strip of land described in plaintiff's complaint herein; that the defendants claim title to said strip subject to an easement of the right of way by adverse possession, founding their claim upon a written instrument, and that the testimony offered on the part of the defendants in the trial of said action completely fails to

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show any adverse possession that would defeat plaintiff's title to the strip in question, therefore the defendants have no interest in said strip either by written instrument or by adverse possession, as a matter of fact; that the defendants did not disclaim and release all claim and right to the real estate described in the complaint, but on the contrary appeared and answered and set up the claim of an interest in said real estate described in the complaint in themselves adversely to the claim of the plaintiff, founding said possession or interest on a written instrument.

The court concluded that the plaintiff is entitled to judgment that his claim be established against any claim of the defendants and that the defendants be forever barred against having or claiming any right or title to the lands described in the complaint adversely to the plaintiff.

Judgment was entered in favor of the plaintiff, from which this appeal was taken.

C. E. Armin, for the appellants.

For the respondent there was a brief by *Merton, Newbury & Jacobson,* and oral argument by *M. A. Jacobson.*

KERWIN, J. Two questions are involved upon this appeal: (1) the construction of a deed from plaintiff to one David C. Ormsby, through whom the defendants claim title to the land in suit, and (2) whether the defendants acquired title by adverse possession to such land under a written instrument.

1. The appellants claim that the land in controversy passed by the deed from plaintiff to Ormsby, while on the part of the respondent it is claimed that it was excepted from such grant. The controversy arises on the words of the deed. After describing forty acres in township No. 7 north, range No. 18 east, the deed contains the following: "Reserving off the east line of the same two rods in width, running into Pewaukee lake, commencing two rods south of the northwest corner of section 24." The plaintiff's contention is that this

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language amounts to an exception of the strip from the grant, while the defendants claim that the strip passed by the grant to Ormsby. In subsequent grants the strip was referred to as a right of way, but these subsequent grants could not enlarge the estate which passed from the plaintiff to Ormsby.

The appellants rely upon the distinction made in the authorities between the words "exception" and "reservation" or "excepting" and "reserving," and it is insisted that because the word "reserving" is used, and not "excepting," in the conveyance, the strip was not excepted from the grant to Ormsby, but passed to him and from him through mesne conveyances to defendants.

Counsel for appellants quotes from *Fischer v. Laack,* 76 Wis. 313, 45 N. W. 104, and the early case of *Rich v. Zeilsdorff,* 22 Wis. 544, where the distinction is drawn between the significance of the words "exception" and "reservation," and it is said in *Fischer v. Laack, supra:*

"The word 'except' is employed, but the subject matter to which it refers is a reservation. These terms are frequently used in deeds as synonymous. Although they are not synonymous, it is immaterial if they are erroneously used one for the other. The court will always determine from the nature and effect of the provision itself whether it creates an exception or a reservation."

While in the instant case the word "reserving" was used, the whole clause is quite significant that an exception of the strip was intended,—"reserving off the east line of the same two rods in width, running into Pewaukee lake, commencing two rods south of the northwest corner of section 24;" and immediately following a right of way is reserved over another tract to be used in common by the parties.

The evidence produced upon the trial of the physical situation and the surrounding circumstances strongly tends to show that it was the intention of the plaintiff and David C. Ormsby that the land in question should be excepted from the

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grant, and the court below so found upon competent and sufficient evidence.

It is well settled by the decisions of this court that the intention of the parties governs in the construction of deeds. *Barkhausen v. C., M. & St. P. R. Co.* 142 Wis. 292, 124 N. W. 649, 125 N. W. 680; *Walterman v. Norwalk,* 145 Wis. 663, 130 N. W. 479; *Williams v. Jones,* 131 Wis. 361, 111 N. W. 505. The words "excepting" and "reserving" are often used indiscriminately and interchangeably, and sometimes what purports to be a reservation has the force of an exception, the technical meaning giving way to the manifest intention of the parties. *Green Bay & M. C. Co. v. Hewitt,* 66 Wis. 461, 29 N. W. 237; *Pritchard v. Lewis,* 125 Wis. 604, 104 N. W. 989; *Fischer v. Laack,* 76 Wis. 313, 45 N. W. 104.

2. It is further insisted by counsel for appellants that the defendants acquired title to the premises in question under a written instrument. This question turns on whether the appellants held the land in question adversely for the required period. The court below found against this contention of the appellants, and after a careful examination we are satisfied that the finding is well supported by the evidence, therefore cannot be disturbed.

By the Court.—The judgment is affirmed.

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SHEPARD and others, Respondents, vs. PABST, Appellant.

February 23—March 12, 1912.

Injunction: Motion to vacate: Sufficiency of complaint: Action at law: Delay as a bar: Vendor and purchaser of land: Contract: Construction: Option to purchase or selling agency: Fraud of agent: Liability of principal: Waiver of fraud in contract induced thereby.

1. A motion to vacate a temporary injunction challenges the sufficiency of the complaint and presents all questions which would be presented by a general demurrer.
2. There is nothing inconsistent in a contract which creates an agency to sell and also gives the agent himself an option to purchase which he may, but is not bound to, avail himself of at any time during his agency.
3. The legal name which the parties to a contract give to their acts or instruments is not controlling in interpretation. The real, substantial nature of the legal relation thereby created will control, and the meaning of the contract is to be ascertained from a survey of the whole instrument, all parts thereof being harmonized if that can be done.
4. The mere execution by the vendor of land of an option contract thereon does not *per se* constitute the holder his agent, and he will not be bound by any fraud or misrepresentation by such holder inducing a sale to a second purchaser, if the contract is only what it purports to be and was not intended merely as a form of agency; and the rule is the same although it is contemplated that the contract may be assigned.
5. In an action to recover damages, based on misrepresentations by which plaintiffs were induced to purchase lands of the defendant, a contract relating to the lands in question and others (the provisions of which are fully stated in the opinion), between defendant and a corporation which is alleged to have made the false representations to plaintiffs, is *held* not to have been a contract of sale nor a mere option contract, but to have created a selling agency in such corporation, with an option on the part of the agent to purchase any or all of the lands at any time up to the termination of such agency; and defendant is responsible, therefore, for fraud of his agent.
6. Where a purchase of land is induced by the fraud of the vendor's agent in pointing out other land as that offered for sale, the vendor is not relieved of liability for such act of the agent by

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a clause in the sale contract to the effect that the purchasers agree and warrant, as part of the consideration for the sale to them, that they have inspected the premises and that they are not relying upon any representation made by the vendor or any agent, and that they explicitly waive any claim on that account. In such a case the agent's fraud avoids the assent to such a clause as well as to the other recitals and stipulations of the contract which the purchaser signs under the influence of such misrepresentation.

7. It cannot be held, on a mere motion to dissolve a temporary injunction, that a delay of six months after discovery of fraud in a sale of land is sufficient, as a matter of law, to bar an action based on such fraud.

8. Where the purchaser of land seeks, in an action at law based on fraud, to recover damages equal in amount to the money paid and the unpaid notes given by him, if there is no averment that defendant is insolvent or unable to respond in damages, plaintiff is not entitled, under sec. 2774, Stats. (1898), to a temporary injunction restraining defendant from selling or transferring such notes or assigning the land contract, or from commencing actions thereon himself, either at law or in equity; and especially should such an injunction be dissolved where the defendant has been permitted to set up in the action a counterclaim upon the unpaid notes.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Lines, Spooner, Ellis & Quarles,* and oral argument by *Louis Quarles.* They cited, among other authorities, *Harney v. Burhans,* 91 Wis. 348, 64 N. W. 1031; *Burnham v. Milwaukee,* 98 Wis. 128, 73 N. W. 1018; *Minneapolis v. Minneapolis St. R. Co.* (Minn.) 133 N. W. 80; *Williams M. & R. Co. v. Raynor,* 38 Wis. 119; *Burton v. Douglass,* 141 Wis. 110, 123 N. W. 631; *Hicks P. Co. v. Wis. Cent. R. Co.* 138 Wis. 584, 120 N. W. 512; *Peoria Mfg. Co. v. Lyons,* 153 Ill. 427, 38 N. E. 661; *Weston v. Brown,* 158 N. Y. 360, 53 N. E. 36; *Fish v. Benedict,* 74 N. Y. 613; *Robinson v. Easton,* 93 Cal. 80, 28 Pac. 796; *First Nat. Bank v. Snell,* 144 Wis. 433, 129 N. W. 668; *Law v. Grant,* 37 Wis. 548; *Rogers v. Cross,* 3 Pin. 36; *Wolf River L. Co. v. Brown,* 88 Wis. 638, 60 N. W. 996.

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For the respondents there was a brief by *T. M. Priestley* and *Fiedler & Fiedler,* and oral argument by *Mr. E. C. Fiedler* and *Mr. Priestley.* They cited *Smith v. Merrill,* 134 Wis. 227, 114 N. W. 508; *Russell v. Andrae,* 79 Wis. 108, 112, 48 N. W. 117; *Arnold v. Nat. Bank,* 126 Wis. 362, 105 N. W. 828; *Collat v. Gottschalk,* 142 Wis. 503, 125 N. W. 957; *Miller v. L. & N. R. Co.* 83 Ala. 274, 4 South. 842; *Crittenden v. Armour,* 80 Iowa, 221, 45 N. W. 888; *Chezum v. Kreighbaum,* 4 Wash. 680, 30 Pac. 1098; *Cannon C. Co. v. Taggart,* 1 Colo. App. 60, 27 Pac. 238; *Faraday C. & C. Co. v. Owens,* 26 Ky. Law Rep. 243, 80 S. W. 1171; *Winders v. Hill,* 141 N. C. 694, 54 S. E. 440; *Morse v. Ryan,* 26 Wis. 356; *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 90 N. W. 476; *Burke v. M., L. S. & W. R. Co.* 83 Wis. 410, 53 N. W. 692; *Garlick v. Morley,* 147 Wis. 397, 132 N. W. 601; *Twentieth Century Co. v. Quilling,* 136 Wis. 481, 487, 117 N. W. 1007; *Freeman v. Harbaugh Co.* 114 Minn. 283, 130 N. W. 1110; and other cases.

TIMLIN, J. Upon a verified complaint having the contracts in question annexed thereunto as exhibits, and an affidavit by two of the plaintiffs, a restraining order was issued enjoining the defendant from selling, assigning, or transferring any and all unpaid notes theretofore executed by the plaintiffs and delivered to the defendant, and from selling, assigning, or transferring a certain written contract, and from commencing or prosecuting any action at law or suit in equity against the plaintiffs, or either of them, upon the said unpaid notes or contract until the further order of the court. The defendant moved before the circuit court to vacate this restraining order, or in the alternative to modify it so as to permit the defendant to commence suit on the notes. This motion was supported by several affidavits and a proposed answer and counterclaim or cross-complaint, and after hearing the circuit court ruled that the complaint was sufficient to state a

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cause of action against the defendant, also that the contract between the defendant and the Western Land Securities Company constituted the latter the agent of the defendant, and that the plaintiffs were not, by reason of anything in the contract between them and the defendant, estopped to allege and prove fraud, and further modified the injunction by permitting the defendant to interpose in this action a counterclaim upon any and all notes held by him against the plaintiffs. From this order the defendant appeals. He contends that the following issues are involved on the appeal: (1) A construction of the contracts between appellant and the Securities Company as to whether they are contracts of purchase or option to purchase, or whether they are contracts of agency; (2) whether this action can be maintained by respondents in view of their stipulation relating to their examination of the land and nonreliance on any representations made to them; (3) whether respondents are guilty of negligence in failing to ascertain the alleged fraud within a reasonable time; (4) whether it is a proper case for an injunction.

It is conceded that the motion to vacate the injunction challenges the sufficiency of plaintiffs' complaint and presents all questions to this court which would be presented by a general demurrer, within the rule of *Harley v. Lindemann,* 129 Wis. 514, 109 N. W. 570; *Sage v. Fifield,* 68 Wis. 546, 32 N. W. 629; and *Judd v. Fox Lake,* 28 Wis. 583. There is thus attempted to be presented *in limine* that very perplexing question discussed in 1 Mechem on Sales, secs. 43 to 50, inclusive. That learned author, writing in 1901, says:

"The cases involving this question have now become so numerous, and the varieties of forms of contracts so great, that it would be impracticable to attempt a full exposition of them in the text." Sec. 47.

This practical consideration, joined with well known common-law rules, forbids any such attempt within the narrower limits of a judicial decision. Confining ourselves as closely

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as possible to the case presented: The defendant, who resided in Waukesha county, Wisconsin, was the owner of about 64,000 acres of land in North Dakota. The Western Land Securities Company was a Minnesota corporation with its principal office and place of business in the city of St. Paul, and engaged, among other things, in marketing, selling, and disposing of lands as agent, for compensation. On December 1, 1907, these two persons entered into an agreement in writing to be hereinafter noticed, and upon the construction of this agreement the case mainly turns. The Securities Company about June, 1908, undertook to sell to the plaintiffs 4,241.76 acres of this land, and, as is averred, falsely and fraudulently pointed out to the plaintiffs as the lands in question other and different lands far superior in quality and value to the lands of defendant, representing such lands so pointed out as the lands which they were selling, and plaintiffs, relying on such representations, paid the money, entered into the contract with defendant, and gave the notes hereinafter mentioned. It does not appear by the complaint exactly when the plaintiffs discovered the alleged fraud. It does appear that they made payments as late as June 29, 1910, and that since the discovery of the fraud they have executed and tendered to the defendant a conveyance or release and relinquishment of all their right, title, and interest whatsoever in the lands included in their contracts with the defendant and offered to deliver the same to the defendant, and they make the offer to reconvey in their pleading, and it also appears by averment that all the sums paid by the plaintiffs upon the purchase price were paid without knowledge on their part of the fraud committed upon them and before the discovery of said fraud. There is an inference then that the fraud was discovered after June 29, 1910, and the action was begun in January, 1911.

The contract between the defendant and the Securities Company recites that the defendant is the owner of the lands

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in question and certain personal property used or intended to be used in connection therewith, and desires to sell and dispose of the lands and personal property except the horses, cattle, hay, etc. This paragraph follows:

"Whereas said party of the second part [Securities Company] is engaged in the purchase and sale of such lands and the marketing the same, in parcels, among settlers and other purchasers, and is desirous to acquire title to said personal property, and the right up to June 1, 1910, to so market, sell, and dispose of the lands aforesaid, and the right to said date to acquire title to such of said lands as shall not be so sold or disposed of: Now, therefore, in consideration of the premises and the sum of $32,000 in hand paid by said party of the second part to said party of the first part, the receipt whereof is hereby acknowledged, and in consideration of the agreements hereinafter contained," etc.

Then follows a recital of the purchase price, a provision that this shall bear interest from December 1, 1907, payable annually, special provisions relating to small tracts to which the title might fail, and then:

"That said party of the second part at its own cost and expense shall forthwith and at all times hereafter, during the life of this agreement, use its best endeavors to find purchasers for all of said lands in parcels, either for cash or upon land contracts to be made with said party of the first part upon terms of not less than one third cash and the balance in not to exceed eight equal annual payments evidenced by the promissory notes of the purchaser thereof payable to the order of the said party of the first part, with interest thereon at the rate of five per cent. per annum, payable annually or semi-annually, which land contracts shall be in the form hereto annexed and marked Exhibit 'D,' and made a part hereof, and shall be executed in duplicate."

The fourth paragraph fixes the minimum price at which the Securities Company may sell the land, and if it goes below that price it must make up the deficiency in cash. Upon each sale the consideration must be promptly paid or turned over

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to the defendant with the said land contract properly executed, and thereupon the defendant, either in person or by his duly authorized agent, shall execute a land contract in duplicate, retain one, and deliver the other to the Securities Company for such purchaser, and credit the amount thereof upon the purchase price, subject to conditions. It was also agreed that the Securities Company might, at its election, purchase from the defendant any of the said lands and pay him for such lands according to the provisions and terms therein for sales to other purchasers. In the sixth paragraph it was stipulated that at any time during the life of the agreement, if the Securities Company should not be in default, the defendant would, upon demand, convey to the Securities Company any parcel or parcels of said lands not theretofore conveyed by him under the contract or agreed to be conveyed by land contract to others, upon payment to the defendant for said parcels in cash at a fixed rate per acre. By the seventh subdivision it was provided that at any time during the existence of the agreement, the Securities Company not being in default and the lands sold amounting to a stated price per acre, the defendant would on demand execute and deliver to the Securities Company his warranty deed of the balance of said land not theretofore conveyed or agreed to be conveyed to others by land contract under the agreement. By the eighth paragraph the Securities Company was given the right to the possession of all the land with an item excepted, but in case it failed to perform its agreements it was required to surrender up possession to the defendant. The Securities Company was required to pay all taxes and assessments during the life of the agreement except such as might be payable by purchasers under said land contracts, and to furnish duplicate receipts to the defendant. It was provided that the covenants of this instrument should extend to the heirs, legal representatives, and assigns of defendant, and to the successors and assigns of the Securities Company.

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In a modification of this contract made February 22, 1908, not otherwise relevant here, some prior contract was described as "a preliminary agreement for the sale or purchase or option to purchase certain lands," and the aforesaid contract as "a permanent agreement therefor." This modification recited certain co-operation between the Securities Company and the defendant to procure for the defendant a release of some claim on part of the land. It corrected some descriptions in the agreement of December 1, 1907, and provided for an indorsement thereon as a payment by the Securities Company to *Pabst* of the sum of $27,740 as of the date thereof.

The land contract which the Securities Company was obliged to make with purchasers was in the same form and contained the same stipulation with reference to representations as that which the defendant made with the plaintiffs and which will now be taken up. This last mentioned contract names the defendant as vendor and the plaintiffs as vendees, does not mention the outstanding option to the Securities Company. It recites a present sale, and it binds the vendor to convey to the vendees, upon performance by them, the lands therein described, which are a portion of the 64,000 acres optioned to the Securities Company. The vendees agree to make a cash payment to the vendor which is receipted, to execute their interest-bearing promissory notes which are described, and to pay all taxes and assessments and furnish duplicate receipts to defendant. A forfeiture for nonpayment is provided, and in such case the property is to come back to defendant, his heirs, legal representatives, or assigns. There is also this provision:

"The said parties of the second part hereby agree and warrant, as a part of the consideration for the sale to them of said land, that they have inspected said premises, and that in making this purchase and in executing this contract they are not relying upon any representation made by the party of the first part, or by any agent or servant thereof, and explicitly waive any claim on that account."

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This contract was rewritten, with slight modification not material on the question here presented, on February 4, 1909.

The complaint expressly charges that the defendant, by writing of December 1, 1907, appointed the Securities Company his agent to market, sell, and dispose of the lands in question, and this may be considered a sufficient pleading of what the defendant intended by that instrument, if such intention is not negatived by the writing annexed to the complaint. The complaint also avers that the plaintiffs purchased the lands from the defendant through the Securities Company, defendant's agent, which conducted all negotiations in behalf of defendant leading up to the making of the contract between plaintiffs and defendant. We are to inquire whether the written instruments show that the Securities Company had authority to do so. Appellant points out, among other things, the following features indicating that the instrument of December 1, 1907, was a contract of sale: (1) The declaration in the amendatory agreement of February 22, 1908, above mentioned describing the preceding agreements; (2) the payment of a large sum of money by the Securities Company to the defendant; (3) the Securities Company was given possession of the property; (4) it was to pay interest on the purchase price and pay taxes; (5) it was given the right to purchase the property; (6) the net proceeds of sales by it to be applied on the purchase price, and when less than the specified price per acre at which it was required to sell, the Securities Company should make up the deficiency; (7) all moneys received over the stipulated price to belong to the Securities Company; (8) the latter had a right at its option to take a deed for the unsold remainder of the tract or for all the tract. Some of these, it will be observed, are quite appropriate to either form of contract, agency or sale. On the other hand, as pointed out by respondents, the contract contained the following indications of agency: (1) It recites that the defendant owns land which he is desirous of selling

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and the Securities Company is engaged in marketing the same among settlers and other persons; (2) the Securities Company is desirous to acquire (a) title to the personal property, (b) the right up to June 1, 1910, to so market, sell, and dispose of the lands, (c) the right up to the date last mentioned to acquire title to such of said lands as shall not be so sold and disposed of; (3) the Securities Company binds itself to use its best endeavors to find purchasers for all of said lands or parcels either for cash or upon land contracts to be made with defendant by the persons whom the Securities Company finds as purchasers; (4) the price for which the Securities Company must sell, the time, terms, and form of the land contract which it must negotiate and find purchasers to agree to, are fixed, and in these contracts the Securities Company does not appear at all, but the purchaser found or procured by it is vendee and the defendant is vendor; (5) the Securities Company did not agree to purchase any of the land from defendant, there are no words of present sale to the Securities Company, the latter was merely given the option to so purchase; (6) if the Securities Company exercises its option to purchase it could do so for the unsold remainder of such land, if any such remainder there should be.

What was the value of the personal property or the value of the use and occupation of the land does not appear. It seems to be assumed by counsel for appellant and by counsel for respondents that this must be either a contract of agency or a contract of sale; that it cannot be both, and there are cases to that effect. Such cases usually involve a question of title, like *Monitor Mfg. Co. v. Jones,* 96 Wis. 619, 72 N. W. 44. There is nothing inconsistent in a contract which creates an agency to sell and also gives the agent an option to himself purchase, which he is at liberty to avail himself of at any time during his agency but is not bound to do so. *Russell v. Andrae,* 79 Wis. 108, 48 N. W. 117; *Puffer v. Welch,* 144

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Wis. 506, 129 N. W. 525; *Arnold v. Nat. Bank,* 126 Wis. 362, 105 N. W. 828.

"Contracts admit of infinite variety, and they are all valid except where lacking a consideration, lacking parties or capacity, lacking mutual assent, or contrary to rules of law or subversive of public morals." *Hartman F. & C. Co. v. Krieger,* 137 Wis. 650, 119 N. W. 347.

There is no rule of law which forbids the principal giving, or the agent taking, an option to the latter to purchase. The legal name which the parties give to their acts or instruments is not controlling in interpretation. The real substantial nature of the legal relation created thereby will control the mere name. Neither are provisions to be isolated, identified, and named as if they stood alone and then set back in their place in the instrument with this meaning fixed so as to overrule the meaning derived from a survey of the whole. All parts of the instrument must be harmonized if this may be done. One of the most significant provisions of the instrument in question is that in which the parties declare what they desire to accomplish. That is, to acquire title to the personal property, to acquire the right to market, sell, and dispose of the lands, and to have the right, within the time limited, to acquire title to such of the lands as shall not be sold or disposed of. They do not agree to purchase the land, but are merely given the option to do so within a time fixed, and during this period of time they have the right to market and sell, but in all such sales made by them to others the defendant fixes the price and the terms, and he has to appear as vendor and such others as vendees. The Securities Company paid a large sum of money, but it acquired therefor the title to the personal property, the possession of the lands, and the right or option to purchase, and the right, up to the time it saw fit to exercise its option to purchase, to market and to sell defendant's lands to whomsoever it could induce to buy and thereby earn

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the difference between the amount for which it sold the land and the price per acre fixed in this contract. The large payment under such circumstances is shorn of much of the significance which was given to it in *Harney v. Burhans,* 91 Wis. 348, 64 N. W. 1031, where the question considered was quite different. There the question which arose between the parties to the instrument was whether a contract of purchase or a mere agency to sell was intended, and it appeared that the promisee or agent had paid nearly half of the purchase price. This fact was properly taken to negative a mere agency and to give the transaction the *indicia* of a purchase. But in the instant case it expressly appears that there was no purchase by the Securities Company of the land. The instrument is carefully drawn, and in no part thereof does the Securities Company agree to purchase the land. The most that could be said is that it has the right to purchase the land not theretofore sold by it to others at any time after the making of the contract and before June 1, 1910, should it elect to do so. All the provisions of the instrument harmonize with this view. Even the amendatory writing of February 22, 1908, upon which much reliance is placed, describes the preliminary agreement as one "for the sale or purchase or option to purchase certain lands." Fixing a price to the Securities Company was a necessary part of the option given it. Requiring it to make up the deficiency, in case of sale by it below the fixed price, was necessary to give some elasticity to that part of the contract which fixed an uniform price per acre upon large tracts which the Securities Company was authorized to sell to settlers in small parcels, presumably at prices somewhat varying according to the quality of the land. The advance by the Securities Company was secured by personal property acquired; by the possession of the lands; and by its option to take the unsold lands and have credit thereon for all its advances; as well as by its commissions or profit on what sales it made to settlers or others. We are convinced that the

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contract in question does not controvert but rather supports the averment of the complaint that it was intended by the parties thereunto to constitute the Securities Company the selling agent of the defendant up to such time as the former exercised its option and became itself a purchaser.

Having reached this conclusion, all difficulty with reference to the effect of the clause quoted from plaintiffs' contract waiving reliance upon representations disappears. For it cannot be successfully contended that a principal may put in the hands of his selling agents an instrument containing such a provision, and, after the agents have by fraud obtained assent to this instrument, hold this part of it conclusive upon the defrauded party. There ought to be some way in which a principal may relieve himself from responsibility for the misrepresentations of his agent which he has not authorized, but certainly it cannot be done by prescribing a form of contract for the agent to negotiate which declares either that there were no misrepresentations or that the party whose consent the agent is to obtain did not rely upon misrepresentations, where the purchaser is induced to buy by pointing out to him land which the principal does not own and which the agent did not intend to sell him as and for the land to be purchased. In such case the agent's fraud avoids the assent to this as well as to the other recitals and stipulations of the contract which the buyer signs under the influence of such misrepresentation. Fraud avoids all contracts, and if one of two innocent persons must be the sufferer it seems more just, at least it is more according to law, that that one should be the principal who selected the dishonest agent and put it in the power of the latter to prey upon the public. *Bridger v. Goldsmith,* 143 N. Y. 424, 38 N. E. 458; *Burroughs v. Pacific G. Co.* 81 Ala. 255, 1 South. 212; *Hickman v. Stewart,* 69 Tex. 255, 5 S. W. 833; *Smyth v. Munroe,* 84 N. Y. 354; *Shapley v. Abbott,* 42 N. Y. 443; *Universal F. Co. v. Skinner,* 64 Hun, 293, 19 N. Y. Supp. 62. The mere execution by the owner of the land of

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an option contract thereon does not *per se* constitute the holder his agent, and he will not be bound by fraud or misrepresentations inducing a sale to a second purchaser, where such contract is only what it purports on its face to be and not intended merely as a form of agency; and the rule is the same although it is expected that the contract may be assigned before its expiration in case the holder should sell the property. *Alger v. Keith,* 105 Fed. 105, 44 C. C. A. 371. This rule may come very close to the situation in the case at hand. A good illustration is found in *Reeves v. McCracken,* 103 Tex. 416, 128 S. W. 895. The distinction between that case and the instant case is that we find in the latter indications of an intention to create a selling agency, giving the agent at the same time an option to himself become the purchaser or go on acting as selling agent.

The real question, therefore, is not to distinguish between a contract of agency and a contract of sale, but to ascertain whether or not the contract in question created a selling agency, with the option on the part of the agent to purchase any or all of the lands at any time up to the termination of his selling agency, or whether it constituted solely an option contract without any agency features. We are convinced that notwithstanding other features in the contract an agency for the purpose of selling was thereby created.

We cannot upon this motion hold that a delay of six months after discovery and before bringing suit would absolutely and as matter of law bar the plaintiffs' action. There may be evidentiary facts not necessary to be pleaded or properly pleadable which would affect this question.

Each of the competent and capable counsel representing the litigants is here asserting that this is an action for damages. We may suggest that this might lead to complications further on and also suggest an examination of the following actions at law: *Isaacs v. Bardon,* 114 Wis. 142, 89 N. W. 913; *Main v. Procknow,* 131 Wis. 279, 111 N. W. 508; *State v.*

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Snyder, 66 Tex. 687, 18 S. W. 106. And see 1 Pomeroy, Eq. Jur. (3d ed.) § 110. In actions for damages based on misrepresentations the vendee usually keeps the property and recovers either more or less than what he paid, and sometimes, but not necessarily, damages equal to the amount which he paid. In actions like *Isaacs v. Bardon, supra,* he recovers the amount paid with interest from the time of demand. But it may be that the plaintiffs can elect to take a lesser measure of damages and still carry on their action as one for damages for deceit, a point which we do not at this stage of the action find it necessary to decide.

When we take up the next question the significance of these observations will appear. Whether or not this is a proper case for injunction depends upon the nature of the right asserted by plaintiffs and denied by defendant. The plaintiffs here seek to recover damages equal to money and notes paid and notes executed and not yet paid to the defendant. But the action being at law, in any event the injunction must rest on the authority given by sec. 2774, Stats. (1898). Assuming that it appears by the complaint that the plaintiffs are entitled to the judgment demanded, yet no part of said judgment demanded consists in restraining the commission or continuance of any act whatsoever, much less the act described in the statute. Neither does it appear that the defendant is doing, or threatens or is about to do, any act whatsoever in violation of plaintiffs' rights, much less an act respecting the subject of the action which would tend to render plaintiffs' judgment ineffectual. It is not in violation of plaintiffs' right to recover damages, which damages include these very unpaid notes, for the defendant to sell the notes if he is so disposed. That would rather emphasize plaintiffs' right to recover the damages they claim. Neither would such act make or tend to make plaintiffs' judgment for damages ineffectual, but the contrary. Nothing of this kind appears in the complaint, but in a supplementary affidavit on which, to-

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gether with the complaint, the restraining order was issued, it merely appeared that "plaintiffs are fearful that the defendant will sell, assign, and transfer said notes to third parties and said third parties will commence actions thereon against the plaintiffs." But if the defendant does not sell or transfer the notes he will commence such actions himself. The conclusion that such actions would result in annoyance and irreparable loss and damage cannot avail against the facts. It is also averred, following this, that the defendant has given out that he will commence and prosecute actions on said notes and contract. This is more explicit, but, as we have seen, he was permitted to come in by counterclaim in this action for that purpose. Hence this cannot support the injunction. The plaintiffs cannot well expect to recover money damages to the amount of the notes given and unpaid and at the same time deny the defendant's ownership of such notes or their binding force. There is no averment that defendant is insolvent or unable to respond in damages. Upon such showing in a case of this kind there was no right to the continuation of the remaining portion of the injunctional order and it should have been vacated.

By the Court.—Order reversed, and the cause remanded for further proceedings according to law.

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ROWLANDS, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

February 23—March 12, 1912.

Statutes: Federal and state: Judicial notice: Pleading: Master and servant: Railroads: Injury to employee: Negligence: Defective mail crane: Questions for jury: Excessive damages: Special verdict: Omitted facts: Presumption on appeal.

1. Acts of Congress are not foreign laws, and state courts take judicial notice of them; and, ordinarily, if the facts alleged in the complaint bring the case within a federal statute, that is sufficient without pleading the statute itself.
2. In an action against a railway company for personal injuries, an allegation that at the time of the injury the plaintiff was employed by defendant as a fireman upon an engine running between Chicago and Milwaukee and hauling passengers, baggage, and mail, shows that he was engaged in facilitating interstate commerce and hence that his rights are referable to the federal Employers' Liability Act (35 U. S. Stats. at Large, 65, ch. 149, as amended April 5, 1910).
3. As to such employees, the federal statute supersedes state statutes covering the same field.
4. If in such case there was any informality about the pleading, as regards the statute, the remedy of defendant was by motion to make more definite and certain.
5. Where the fireman on an engine, while leaning out of the cab to view the track ahead, was hit by the arm of a mail crane, and thereby the outer plate of his skull was fractured, while the inner plate, only about one sixteenth of an inch therefrom, was not broken, undisputed evidence that the arm of the crane was one inch lower than the standard prescribed by law was sufficient to sustain a finding by the jury that defendant was negligent, regardless of whether there was any conflict in the evidence as to the amount of clearance between the side of the train and the end of the arm.
6. There being evidence in such case that plaintiff had no knowledge of the mail crane and had not before fired on a mail train passing that point in the daytime, and that when firing on freight trains his attention would not be called to the danger because the arm of the crane was turned away when not in use, the questions of assumption of risk and contributory negligence were for the jury.

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7. An award of $8,700 is *held* not excessive for an injury to a locomotive fireman twenty-eight years of age and earning $125 a month, where his skull was fractured for a length of four and one-half inches, he was wholly incapacitated for labor for a year, and the evidence tended to show that the injury was permanent, at least without an operation the benefit from which would be uncertain.
8. On appeal, as against an objection that the verdict is informal and does not cover all the material issues, where appellant did not at the trial request the submission of any question which would have cured the defect complained of, it will be presumed that the trial court found favorably to respondent on any material issue not passed on by the jury.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

On the morning of February 25, 1910, plaintiff was in the employ of the defendant company as a fireman on a locomotive hauling a combination passenger, baggage, express, and mail train from the city of Chicago to the city of Milwaukee. The train was a fast train and made but a few stops between the two stations above named. At Zion City, Illinois, mail was taken aboard while the train was traveling at a high rate of speed. For this purpose there was constructed at the westerly side of the railway tracks a mail crane, which consisted of an upright mast or standard placed on a foundation and standing perpendicularly some distance from the nearest rail of the track. From the upper portion of the mast, at a proper height to hold the mail sack in position, an arm extended toward the track, and from this arm the suspended mail sack was grabbed by a device attached to the side of the mail car. As the train approached the station, plaintiff, in order to get a view ahead, projected his head out of the cab window and was struck by the arm of the crane, and this action was brought to recover damages for injuries sustained. It was claimed that the defendant was negligent in maintaining the said mail crane so near its tracks as to endanger the lives of passengers and employees, and further, that the frame which inclosed the mast and which was intended to hold

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it in a vertical position had become worn so that there was from an inch and a half to two inches play, which permitted the mast to droop toward the track when the crane was in use and likewise permitted the arm of the crane to project downward and nearer to the track than it would otherwise come; also that it was necessary for plaintiff in the performance of his duties to keep a sharp lookout ahead, and that the said crane was out of repair and so situated as to render his place of work unsafe. The answer denied generally the allegations of the complaint, alleged contributory negligence on the part of the plaintiff, and further, that, the injuries having been received in the state of Illinois, the law of that state was applicable. The case was submitted to the jury on a special verdict, which, with the answers thereto, is as follows:

"(1) At the time of the injury to the plaintiff was the mail crane in question, in its then position and condition, reasonably safe as regards the safety of defendant's employees working on the train? *A.* No.

"(2) If you answer the first question 'No,' then answer this question: Was the working place of the plaintiff thereby made unsafe? *A.* Yes.

"(3) If you answer the second question 'Yes,' then answer this question: Was such unsafe working place the proximate cause of plaintiff's injuries? *A.* Yes.

"(4) Was plaintiff guilty of any negligence on his part which contributed proximately to produce his injuries? *A.* No.

"(5) What sum of money will compensate plaintiff for the damages suffered in consequence of the injuries received by him? *A.* $8,700.

"(6) If you answer the fourth question 'Yes,' then answer this question: If the court shall order judgment for plaintiff, in what sum shall his damages be diminished on account of the negligence attributable to the plaintiff? *A.* ——."

Upon such verdict judgment was entered in favor of plaintiff, from which judgment defendant appeals.

For the appellant there was a brief by *William G. Wheeler,*

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attorney, and *Edward M. Smart,* of counsel, and oral argument by *Mr. Smart.*

For the respondent there was a brief by *Holt & Coombs,* attorneys, and *E. Merton,* of counsel, and oral argument by *Mr. Merton* and *Mr. A. N. Coombs.*

BARNES, J. The complaint alleged that the plaintiff was a resident of Wisconsin; that on February 25, 1910, he was in the employ of the defendant on a passenger engine owned by it and "used and operated over and upon the lines of said defendant company at and between the city of Chicago, in the state of Illinois, and the city of Milwaukee, in the state of Wisconsin," and further, "that on the morning of the 25th day of February, 1910, the plaintiff was employed by and working for said defendant company in the capacity of a fireman of an engine which was then and there being used to haul a combined passenger, baggage, express, and mail train from the city of Chicago northward toward the city of Milwaukee." It is further alleged that plaintiff, while employed as aforesaid, was injured at Zion City.

At the close of plaintiff's case in chief a motion was made to dismiss the action because the complaint was framed under the state statutes, whereas the proof showed that the case was one "which should be properly brought under the federal Employers' Liability Act." The motion was denied and such ruling is assigned as error.

We think the facts were sufficiently pleaded to show that the case was within the federal statute and that it was unnecessary to plead the statute itself. Acts of Congress are not foreign laws and state courts take judicial notice of them. 12 Ency. of Ev. 31, and cases cited in note 2. Ordinarily if the facts alleged bring the cause of action within the terms of a federal statute, this is sufficient. The averment that plaintiff was employed as a fireman on an engine running between Chicago and Milwaukee and hauling passengers and

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mail shows that plaintiff was engaged in facilitating interstate commerce. This being so, his rights were referable to the federal law referred to (35 U. S. Stats. at Large, 65, ch. 149, as amended April 5, 1910). As to such employees, the federal statute supersedes state statutes covering the same field. *Second Employers' Liability Cases* (*Mondou v. N. Y., N. H. & H. R. Co.*) 223 U. S. 1, 32 Sup. Ct. 169; *State v. C., M. & St. P. R. Co.* 136 Wis. 407, 117 N. W. 686. It is not claimed that the state courts have not jurisdiction to try actions coming under the statute referred to. If there was any informality about the pleading, the remedy of defendant was a motion to make the complaint more definite and certain. It was not a case where one cause of action was pleaded and another was proven. The pleader seems to have attempted to state the necessary facts to bring the case within the federal law. In *Creteau v. C. & N. W. R. Co.* 113 Minn. 418, 129 N. W. 855, relied on by appellant, the plaintiff specifically pleaded ch. 254, Laws of Wisconsin for 1907, and based his right of recovery thereon, and the court held that it was error under such a pleading to allow a recovery under the federal law. We think the cause is far afield from the one we have before us.

The contention most strenuously urged by appellant is that there was no evidence of negligence on its part. Its witness Main testified that mail cranes are erected on a uniform plan and that the standard clearance between the inside of the ball of the near rail and the catch near the end of the hook where the strap of the mail pouch is suspended is three feet nine inches. Witness Flynn testified that the regular clearance is three feet and nine inches from the inside of the ball of the rail to the end of the arm. There is a slight discrepancy between the testimony of the witnesses, as the photographs offered indicate that the hook is not attached to the extreme end of the arm. Both witnesses are agreed that the standard distance from the top of the rail to the bottom of the

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upper arm is ten feet and one half of an inch, and Flynn testified that the distance in the instant case was one inch less than the standard. It was also shown, and is undisputed, that the railway company is not permitted to change this standard without the consent of the United States. Defendant contends that the lateral clearance in the present case was two and one-half inches greater than the standard, and that therefore any extra play which the mast might have had did not bring the arm as close to the side of the train as it would have come had the standard clearance been maintained. Defendant also contends that the uncontradicted proof shows that the mast was wedged back at the time plaintiff was injured. Defendant's witness Flynn made the only measurements in reference to clearance that were produced, and it is argued that, inasmuch as the other witnesses only estimated the distance, their evidence raised no issue on the question. However this may be, we think there was evidence from which the jury could find defendant negligent. The demand of the public for rapid transit and frequent mail delivery has led to the introduction of the mail crane, and it, like other obstructions close to a railway track, has made the employment of trainmen more hazardous. Having adopted a standard that may of necessity be dangerous, defendant had no right to materially increase the danger by permitting the crane to become out of repair. The evidence is undisputed that the upper arm had worked out of the mortise in the mast three quarters of an inch. This had a tendency to throw it outward and downward, and no doubt accounts for the fact that it was an inch below the standard height. In a situation of this kind the departure from the standard cannot be regarded as trivial. Even an inch might materially increase the danger to employees, and the jury might well have found in the instant case that the lowering of the arm was the sole cause of plaintiff's injury, because it might conclude from the evidence that plaintiff was struck by the lower

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corner of the arm. The outer plate of the skull was fractured, while the inner plate, only about one sixteenth of an inch therefrom, was not broken, notwithstanding the fact that it is much more frail and brittle than the outer plate. It is reasonably certain that, had the arm been an inch farther from plaintiff's head, he would either have escaped injury or have been injured very slightly. So, regardless of whether there was any conflict in the evidence as to the amount of clearance between the side of the train and the end of the arm, we think the undisputed facts in the case were such that the jury might have found the defendant negligent.

We are satisfied that the questions of assumption of hazard and of contributory negligence were jury questions, and that the court cannot say as a matter of law that plaintiff either assumed the risk or was guilty of contributory negligence. A review *in extenso* of the evidence on these questions would serve no useful purpose. The plaintiff testified that he thrust his head out of the window to look for signals, as it was his duty to do, and that he had no knowledge of the existence of the mail crane. He had not fired on any passenger train which ran through Zion City in the daytime, until the day he was injured, and his work on freight trains was not calculated to call his attention to the danger to be apprehended from mail cranes, inasmuch as the arms were swung away from the track when not in use and would not endanger an employee riding in the cab of an engine.

The jury awarded the plaintiff $8,700 damages, and it is contended that the verdict is excessive. The plaintiff was about twenty-eight years of age and earning $125 a month at the time of the injury. The injury itself was serious. The outer table of the skull was fractured for a length of four and one-half inches. Plaintiff testified that he was wholly incapacitated for labor during the year that elapsed between the time of the injury and the time of the trial.

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There was medical testimony tending to show that the injury was permanent, at least unless relief could be secured by an operation, and it was a matter of conjecture whether an operation would afford anything more than temporary relief. The case is one where the award of the jury should not be disturbed.

It is said that the verdict is informal and insufficient because all of the material issues in the case were not submitted to the jury. No question was requested which would tend to cure the omissions complained of. Such being the case, we must presume that the court found in plaintiff's favor on any material issue not passed on by the jury.

By the Court.—Judgment affirmed.

STATE VS. WADHAMS OIL COMPANY.

February 26—March 12, 1912.

Criminal law: Injunctional order restraining infringement of alleged invalid statute: Violations during life of order: Subsequent prosecution: Jurisdiction.

1. The preliminary injunctional order issued in an action to restrain state officials from executing a statute containing penal provisions, on the ground that such statute is unconstitutional, does not exempt the plaintiff from the operation of the law or suspend it as to him, and is no defense to a criminal prosecution of such plaintiff, commenced after a final decision upholding the statute and dissolving the injunctional order, for violations of the law during the time the injunction was in force.
2. The action in such a case to restrain interference with rights and property under an invalid act and hence without authority of law, is an ordinary suit in equity, not prerogative in its character. That a circuit court commissioner had jurisdiction to issue the injunctional order therein is assumed, but not decided.

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CERTIFIED from the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Question answered in the negative.*

July 31, 1909, the defendant commenced an action in equity to enjoin the state supervisor of inspectors of illuminating oils from executing ch. 363 of the Laws of 1909, known as the oil inspection law. A temporary injunction was issued enjoining the state supervisor and the inspectors from executing the law as against the defendant. A demurrer to the complaint was sustained in circuit court on October 18, 1909, and the temporary injunction was dissolved. On appeal to this court a decision was rendered sustaining the law as constitutional and affirming the orders of the circuit court sustaining the demurrer and dissolving the injunction.

After the decision of this court an information containing numerous counts was filed by the district attorney of Sheboygan county charging the defendant with repeated violations of the oil inspection law during the pendency of the injunction in the equity case. The defendant was found guilty upon twenty-six counts.

The trial court, being in doubt as to whether or not this injunctional order issued in the action by the defendant against the state supervisor of inspectors of illuminating oils constitutes a defense to this prosecution, certifies the following question to this court:

"Is the injunctional order issued by Court Commissioner Ryan in said equity action a defense in this action to the criminal prosecution of the *Wadhams Oil Company* for the violation of said act as charged in said information, for sales of petroleum products made by said company during the pendency of such injunctional order and contrary to the provisions of said act?"

For the plaintiff the cause was submitted on the brief of

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the *Attorney General* and *Russell Jackson,* deputy attorney general.

For the defendant the cause was submitted on the briefs of *Marshutz & Hoffman,* attorneys, and *George P. Miller,* of counsel. To the point that the temporary restraining order, being granted by a court of competent jurisdiction, that is, one having jurisdiction of the subject matter and the parties, did in effect suspend the operation of the statute as to the *Wadhams Oil Company* while it was in force, they cited *Louisville & N. R. Co. v. Railroad Comm.* 157 Fed. 944; *Central of Georgia R. Co. v. Railroad Comm.* 161 Fed. 925; *Western R. of Alabama v. Railroad Comm.* 171 Fed. 694; *Ex parte Young,* 209 U. S. 123, 28 Sup. Ct. 441; *Hunter v. Wood,* 209 U. S. 205, 28 Sup. Ct. 472; *Cotting v. Kansas City S. Y. Co.* 183 U. S. 79, 22 Sup. Ct. 30; *In re Neagle,* 135 U. S. 1, 10 Sup. Ct. 658.

SIEBECKER, J. Assuming, without deciding, that, upon the ground that the oil inspection law (Laws of 1909, ch. 363) was an invalid act, the circuit court commissioner had jurisdiction to make the injunctional order in the action brought by the defendant against Edward L. Tracy as state supervisor of inspectors of illuminating oils and thereby to enjoin him from enforcing the provisions of the law providing for such inspection against the defendant and from interfering with the conduct of its business in selling such oils without having had them inspected, we then have the question presented: Is this order a defense to the prosecution of the defendant criminally for violations of this law through sales made by it of oils not inspected as required by such law during the pendency of such injunctional order, since the law was challenged as invalid legislation in the action wherein the restraining order was made?

The contention of the defendant is that the defendant is protected against the incurring of the penalties for selling

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oils contrary to the mandate of the law during the pendency of such preliminary order. The injunctional order here involved restrained the oil inspectors from inspecting plaintiff's oils and from instituting civil and criminal suits during its pendency. The order was unquestionably made upon the ground that the court had jurisdiction within its equity powers to enjoin such prosecutions in order to protect the plaintiff's property rights and because it deemed that such rights would be imperiled by the execution of a void statute through wrongfully subjecting the plaintiff to a multitude of civil and criminal suits and through harassing it to an extent that would amount to a deprivation of the right which entitles every person to a certain remedy in the law for the redress of injuries he may receive in his person or property. *Milwaukee E. R. & L. Co. v. Bradley,* 108 Wis. 467, 84 N. W. 870; *Joseph Schlitz B. Co. v. Superior,* 117 Wis. 297, 93 N. W. 1120.

The argument is made that whatever protection the defendant would have under such an order, had the law been unconstitutional, must be given it during the pendency of the order, though it was finally adjudged that the legislative act was constitutional, and that it must result from this that the defendant, by force of the preliminary order, was exempted from the operation of the statute during the pendency of the order. This gives an effect to such a preliminary restraining order wholly beyond its purpose and function. It is well recognized that such orders have been used and employed to maintain the *status quo* of the rights of parties and thus protect persons against irreparable injuries in the law. Its legal object is to preserve a person's property or rights in controversy until a final adjudication is reached upon the merits of the controversy, but it does not in a legal sense conclude the rights of the parties. The very nature of the remedy suggests that it can have no other effect than to maintain the existing status of a party's personal and property rights until a

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court can finally adjudge whether they would be imperiled. The effect thereof is not to exempt a person from the operation of the law or to suspend it as to him. It does no more than postpone the enforcement of the law until the rights of the persons under the law are declared by a final judgment of a court exercising jurisdiction in the matter. As declared in *Consolidated V. Works v. Brew,* 112 Wis. 610, 88 N. W. 603:

"The proper function of such an order (at least in ordinary cases) is simply to restrain the commission of some act or acts during the progress of the litigation, or, as otherwise expressed, to maintain the *status quo.*"

See, also, *Milwaukee E. R. & L. Co. v. Bradley,* 108 Wis. 467, 84 N. W. 870; *McCord v. Akeley,* 132 Wis. 195, 111 N. W. 1100; *L. L. & G. R. Co. v. Clemmans,* 14 Kan. 82; *Audenried v. P. & R. R. Co.* 68 Pa. St. 370.

It necessarily follows that the defendant was subject to the legislative act during the pendency of the preliminary restraining order and during this time it acted at its peril in committing any act violating its provisions, if the act should finally be adjudged to be a valid legislative enactment. It therefore follows that the preliminary injunctional order in the equity action is no defense in this criminal prosecution against the defendant for violations of the law, as alleged in the information filed herein, for sales of petroleum products made by it during the pendency of such injunctional order.

References in defendant's brief to the litigation embraced in the equitable action brought by it against the supervisor of inspectors of illuminating oils as a prerogative cause are erroneous. The action was manifestly an ordinary suit in equity to restrain interference with rights and property under an invalid act and hence without authority of law. *Income Tax Cases,* 148 Wis. 456, 134 N. W. 673.

The question submitted under the report of the case to this court pursuant to sec. 4721, Stats. (1898), must be answered in the negative.

By the Court.—The question reported is answered No.

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SMITH, Plaintiff in error, vs. THE STATE, Defendant in error.

February 26—March 12, 1912.

Criminal law: Burning insured property: Validity of policy: Unlicensed company: Authority of agent: Evidence.

1. In a prosecution under sec. 4405, Stats. (1898), for wilfully burning insured property with intent to defraud the insurer, it is not essential to prove that the insurance was under a valid policy, if the insured believed it to be valid.
2. The policy is admissible in evidence in such a case without proof that the insurance company was licensed to do business in this state.
3. Oral testimony of the person who countersigned the policy as agent and delivered it, that he was the company's agent, was competent to show his authority in that regard.
4. Failure by a foreign insurance company to comply with sec. 1945e, Stats. (1898),—forbidding the writing of policies except through agents duly authorized by the insurance commissioner,—does not relieve the company from liability upon its policies issued contrary to that statute.

ERROR to review a judgment of the municipal court of Racine county: WILLIAM SMIEDING, JR., Judge. *Affirmed.*

The plaintiff in error was convicted of having violated sec. 4405, Stats. (1898), prescribing punishment for wilfully burning any building which shall, at the time thereof, be insured against loss or damage by fire, with intent to injure the insurer.

Plaintiff in error obtained insurance, in due form, on her dwelling house, through an agent. The policy was made on a printed blank signed by the officers of the company in the usual way and countersigned by such agent. The latter testified without objection, that he was such agent to do such business at the time the policy was issued. There was no affirmative evidence as to whether the company was licensed to do business in this state. During the policy period the building was injured by fire. Prior thereto a judgment of foreclosure of a mechanic's lien on the building had been entered

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and some proceedings taken in regard to the enforcement thereof. Between the time of such entry and the fire the accused removed most of her furniture from the building and absented herself therefrom, in general, except nights. She had the policy of insurance in her possession when the fire occurred and retained it thereafter though asked therefor. There was evidence tending to prove that she supposed the insurance on the building to be enforceable when the fire took place. The cause was submitted to the jury on the evidence, resulting in a conviction and sentence.

The cause was submitted for the plaintiff in error on the brief of *John H. Paul,* and for the defendant in error on that of the *Attorney General, Russell Jackson,* deputy attorney general, and *William W. Storms,* district attorney for Racine county.

MARSHALL, J. The cause involves a few questions which may well be briefly answered.

Was it essential to prove that the insurance was under a valid policy? That is ruled in the negative by *Parb v. State,* 143 Wis. 561, 128 N. W. 65. It is considered that no time need be spent justifying the decision in that case. It may be regarded as now considerately affirmed.

Did the court err in permitting the insurance policy to be received in evidence without proof that the company was licensed to do business in this state? That is also ruled in the negative by *Parb v. State, supra.* If plaintiff in error received the policy as the contract of the company and relied thereon up to and inclusive of the time of the fire and purposed, at such time, to recover thereon, that was sufficient as regards the statute, sec. 4405. Moreover, as suggested, the company was liable regardless of whether it offended against the statute in doing business here without being licensed.

Was the oral evidence of the person who countersigned the policy as agent and delivered it, that he was the company's

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agent, competent to show authority in that regard? The fact of agency may be established by oral testimony of the agent where his appointment is not in fact in writing, or required to be. *O'Conner v. Hartford F. Ins. Co.* 31 Wis. 160; *Roberts v. Northwestern Nat. Ins. Co.* 90 Wis. 210, 62 N. W. 1048. There is no written law requiring, as between an insurance company and third persons, agency appointments to be in writing. Sec. 1945*e*, Stats. (1898), penalizes the doing of business by a foreign insurance company in this state other than through agents duly authorized by the commissioner of insurance. The purpose of that is not to protect insurance companies. Failure to comply therewith by a company does not relieve it from liability upon its policies issued contrary to the statute. That sufficiently answers the foregoing questions but it might have been well passed with the suggestion that the evidence was received without objection.

It is said that the policy was void when the fire occurred because of a provision therein that, in case of the entry of a judgment of foreclosure and sale, the insurance shall become void. Counsel does not correctly quote from the policy. The language is this: The insurance shall be void in case of foreclosure proceedings "under any mortgage or trust deed." There were no such proceedings. Moreover, it was sufficient for the case, as before indicated, if plaintiff in error held the policy at the time of the fire supposing it to be enforceable, and fired the building intending to rely upon the policy contract for indemnity.

By the Court.—Judgment affirmed.

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PEYTON, Respondent, vs. MINONG LUMBER & LATH COMPANY and others, Appellants.

February 21—April 3, 1912.

Corporations: Insufficient stock subscription: Management: De facto *officers: Mortgages: Validity: Consent of all parties: Chattel mortgages: Filing: Actual possession: Logs and lumber.*

1. Although a corporation never became legally authorized to elect officers or to transact business with any others than its members, transfers of the corporate property to a stockholder as security for the repayment of moneys advanced by him to *de facto* officers for corporate uses are *held* to be valid transfers, the *de facto* officers who made them in the name of the corporation having been carrying on its business in an informal way with the knowledge and consent of all the other stockholders, and no rights being involved other than those of persons who had consented, either expressly or impliedly, to everything that was done.
2. Sawmill property of a lumber company was leased to one C., who agreed to manufacture into lumber a quantity of logs belonging to the company under the supervision and control of one P., who was to pay the expenses of manufacture. The logs were conveyed to P. as security for the company's indebtedness to him, and he was authorized to sell the lumber and, after paying the expense of manufacture and the indebtedness to him, to return any surplus to the company. *Held*, that delivery of the logs to C. under the agreement was a delivery to P., and C.'s possession during the process of manufacture was actual possession by P., so that the agreement, though never filed, was a valid chattel mortgage as against a subsequent execution levy.

APPEAL from a judgment of the circuit court for Douglas county: JAMES WICKHAM, Judge. *Affirmed.*

This is an action to reform and foreclose a bill of sale executed in lieu of a chattel mortgage and covering a quantity of logs, also to foreclose a chattel mortgage upon a leasehold interest in lands and the buildings thereof, and to enjoin the defendants *Spafford* and *Sullivan* from selling said property

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upon execution. The action was tried by the court. It appeared by the evidence that the *Minong Lumber & Lath Company,* which is alleged to have executed the securities in question, is a domestic corporation organized by the execution and filing of articles of incorporation in October, 1906, with a nominal capital stock of $10,000, divided into shares of $1 each, the incorporators being John V. Gilbert, Laura Gilbert, his wife, and one Newton. There were no written subscriptions to the stock. Twenty-six hundred shares were issued to John V. Gilbert, 360 to Laura Gilbert, 1,500 to the defendant *Spafford,* and 100 to the plaintiff, *Peyton.* One share was sent to an attorney for Mr. Newton, but there is nothing to show that it ever reached him. Newton simply signed the articles in order to satisfy the requirement of the statute for three corporators and does not appear further in the case. Laura Gilbert owned a sawmill site near the village of Minong, Washburn county, and prior to the organization of the corporation John V. Gilbert had done considerable work and furnished material in getting flowage, preparing tail races, bringing down timber, etc., preparatory to the building of a mill and dam, and he turned this work and improvements over to the corporation in part payment for his stock. *Spafford* kept a store at the village of Minong, and he paid in $200 in cash on his stock. *Peyton* had a bank at Proctor, Minnesota, at which the corporation did its banking business, and paid $100 for his stock by crediting up $100 to the account of the corporation. Soon after the articles of incorporation had been filed Gilbert solicited *Spafford* to become a stockholder, and after some solicitation he consented, it being understood that he was to receive $1,500 worth of stock for $1,000. There were probably no meetings of the stockholders or directors in a formal sense ever held. Gilbert claims that he and *Spafford* and Mrs. Gilbert met at *Spafford's* store, and that it was agreed that he (Gilbert) should be president of the corporation, Mrs. Gilbert

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secretary, and *Spafford* treasurer, and that the three should constitute the board of directors. *Spafford* denies that any such meeting was held, but admits that he agreed to take $1,500 worth of stock for $1,000, and talked matters over with Gilbert and understood that Gilbert was to be president and he himself treasurer, and that Mrs. Gilbert was to be secretary for the time being. Whether any meetings ever took place or not, it is clear that a general understanding was reached between the three persons named that the business was to be prosecuted by Gilbert and *Spafford* as the active members of the concern. In pursuance of this general understanding, the work of building a small sawmill on the mill site leased from Mrs. Gilbert was actively pushed in the late fall and winter of 1906, Mr. Gilbert being in charge of the building operations. An understanding was reached with Mrs. Gilbert by which she agreed to lease the site for three years at $120 per year, and a lease was drawn to that effect, but never executed by her. However, possession was taken and corporate stock was issued to and received by her for $360 in payment of the three years' rent. *Spafford* claims that he knew nothing about the issuance of this stock, and that it was issued by Gilbert without his knowledge or consent. In December, 1906, Gilbert purchased logs and lath bolts for the mill, and issued orders in payment directed to the corporation by name, which were cashed by *Spafford* and sent by him to *Peyton,* who returned the cash thereon to *Spafford* and charged the amounts to the corporation on his books. *Spafford* paid for the sawmill machinery. *Spafford* bought the first boiler and engine. January 9, 1907, Gilbert and wife gave plaintiff a mortgage on two lots owned by them in Proctor Knott, Minnesota, for $2,000, as security for advances made and to be made. Prior to March 5, 1907, *Mr. Peyton* had advanced about $2,000 by way of cashing orders for logs. On that date J. V. Gilbert and wife, claiming to act as president and secretary of the corporation, gave

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to plaintiff a bill of sale of 200,000 feet of jack pine timber as security for the existing indebtedness. This is the first instrument involved in this action. It is admitted that by mistake it described the timber as on the N. E. ¼ of the N. E. ¼ of section 22, when in fact it was on the N. W. ¼ of the N. W. ¼ of said section, and this is the respect in which reformation is asked in this action. Mr. and Mrs. Gilbert testified that this bill of sale was given after a conference with *Spafford* and with his consent, but this was denied by *Spafford.* Subsequently other logs were purchased and paid for by orders cashed by *Spafford* and *Peyton* and mixed with the logs covered by the bill of sale. To the knowledge of *Peyton* and with his acquiescence, the bill of sale was duly filed in the proper office March 12, 1907. In May, 1907, sawing of logs and lath bolts began under the active management of Gilbert, and sales began to be made. Some 80,000 feet were sold, and half of it sold and shipped out and the money received by *Spafford.* There was an accident to the boiler in June which delayed sawing for a time, and another boiler was installed in August and sawing was continued until the pond froze up. *Spafford* actively assisted in the sale of the product, advanced money to carry on the business, and went to the mill weekly to see how matters were progressing. December 10, 1907, Gilbert and wife, acting as president and secretary of the corporation, executed on behalf of the corporation a mortgage covering the leasehold interest of the corporation in the sawmill property and the buildings thereon to the plaintiff to secure all indebtedness of the corporation as the same should mature, not exceeding $5,000 at any one time. The Gilberts claimed that this mortgage was executed after consultation with *Mr. Spafford* and with his consent, but *Spafford* denied this. This mortgage was duly recorded January 25, 1908. The court found that the corporation was insolvent at the time it was executed. January 17, 1908, Mr. and Mrs. Gilbert, acting

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as president and secretary of the corporation, gave the plaintiff in the name of the corporation two notes for $1,500 and $2,267.34, respectively, representing the amount that *Peyton* had advanced to the corporation up to that time. These notes included $208.79 for discount, so called, in excess of interest. August 25, 1908, a written agreement was entered into between the plaintiff, Mr. and Mrs. Gilbert, claiming to act for the corporation, and one Caleson, which recited the indebtedness of the *Minong Lumber & Lath Company* to *Mr. Peyton* of $3,767.34 and that the company was unable to pay the same, but that the company had a large quantity of jack pine logs which it was desirous of manufacturing into lumber, but had no capital to pay for manufacturing the same, and that Caleson had offered to manufacture the logs into lumber and lath, provided provision was made for the payment of agreed price for manufacturing, and that therefore the *Minong Lumber & Lath Company* leased to Eli Caleson the mill plant of the property, together with the tools and appliances, until the 31st day of December, 1908, at which time Eli Caleson was to deliver up the premises quietly and peaceably, and that on the 15th day of each month Caleson was to submit to *Peyton* his pay roll for the labor employed in the manufacture, and, if satisfied with the correctness of the pay roll, *Peyton* was to pay the same, and upon the completion of the manufacture *Peyton* was to pay Caleson the balance of compensation, if any, at $4 a thousand for lumber and $1 a thousand for lath. The agreement recited that it was in no way to affect the bill of sale of the logs theretofore given to *Peyton,* but was given in addition to said bill of sale; and, for the purpose of carrying out the agreement, the *Minong Lumber & Lath Company* granted, bargained, sold, transferred, and conveyed to *Peyton* the logs and the lath and lumber that might be manufactured therefrom, and authorized *Peyton* to sell the lumber and lath for such price, at such times, and in such quantities as he deemed best, and

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out of the proceeds of the sale to pay, first, all expenses connected with the manufacture and sale of the lumber and lath, and, second, all indebtedness due and owing him from the *Minong Lumber & Lath Company,* and the balance, if any, to be paid over to the *Minong Lumber & Lath Company.* The lumber was to be insured for the benefit of all the parties as their interest might appear.

The Gilberts testified that *Spafford* knew of and consented to the making of this agreement before its execution, but *Spafford* testified that he knew nothing about it till after its execution, and immediately protested against it when informed of it. The corporation was insolvent when this agreement was made. Under this agreement Caleson took possession of the logs and the mill early in September, 1908, and began sawing, and finished the same, except an insignificant amount, some time in December, the date not being definitely fixed by the evidence. The plaintiff paid for the manufacturing done by Caleson $694.80 over and above all receipts, and also paid for insurance and repairs on the mill $164.39, making a total net outlay of $859.19 under the terms of the Caleson contract. October 27, 1908, the defendant *Spafford* commenced an action against the corporation for advances of cash made by him, and on December 1, 1908, obtained judgment for $6,065.43 damages and costs. Execution being issued upon this judgment, the defendant *Sullivan,* as sheriff of Washburn county, at some time between December 1st and 9th levied upon the lumber, lath, and buildings involved in this action. This action was begun December 23, 1908. Under stipulation of the parties the entire property was placed in the hands of the plaintiff to be sold, the proceeds to take the place of the property itself and abide the judgment of the court, and nearly all of it has been sold, and the sum of $1,525.72 realized therefrom.

The court found that the bill of sale, chattel mortgage, and the so-called Caleson contract were all duly executed by the

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authorized agents of the corporation, and were valid; that the plaintiff took actual possession of the property under the Caleson contract immediately after its execution, and that consequently it was valid as a chattel mortgage; that the bill of sale should be reformed as prayed; and that the plaintiff was entitled to judgment of foreclosure and sale of the property in dispute by virtue of the said securities and to priority over the execution levy of the defendant *Spafford.* From judgment in accordance with this finding the defendants appeal.

For the appellants there was a brief by *Grace, Hudnall & Fridley* and *L. H. Mead,* and oral argument by *Geo. B. Hudnall.*

For the respondent there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.*

WINSLOW, C. J. The *Minong Lumber & Lath Company* had an authorized capital stock of 10,000 shares. Under the most favorable view of the evidence only 4,561 of these shares were ever subscribed for, hence the corporation was never authorized to transact business with any others than its members, it could have no meetings, elect no officers, and its affairs could only be legally directed by the signers of its articles of incorporation. However, it became a legal corporation by virtue of the due execution, recording, and filing of its articles of incorporation, and it afterwards acquired property, and the questions arising here are simply whether certain attempted transfers of that property as security for the repayment of moneys advanced to *de facto* officers of the corporation for corporate uses are valid transfers.

If the question arose between creditors of a *de facto* corporation on the one side and its officers or stockholders upon the other, there might be some serious difficulties presented, but it does not so arise. The contending parties here were both stockholders in the corporation, and knew all the facts not only as to the amount of stock issued, but as to the in-

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formal way in which the business was carried on. The evidence shows that J. V. Gilbert, Laura L. Gilbert, *Frank Spafford,* and *H. H. Peyton* were the sole persons beneficially interested as stockholders in this corporation, for the one dollar interest of Mr. Newton, who signed the articles simply as a matter of convenience and has not been heard of since, may properly be treated as negligible. The four people above named by general consent carried on the business of the corporation during its whole brief and troubled existence in entire disregard of any statutory provisions, and in fact without attempting to observe the most familiar and usual methods of transacting corporate business. It is true that they used the corporate name; Mr. Gilbert called and signed himself president; *Mr. Spafford* called and signed himself treasurer, and Mrs. Gilbert in the same way rejoiced in the title of secretary. Letter-heads and bill-heads and checks flourished the imposing corporate name of the concern, but there was little else to indicate that any of the parties had the idea that the corporate name was more than a mere figure-head. *Mr. Spafford's* testimony shows this to be the case more clearly than that of any of the other parties. He never apparently treated the corporation idea seriously; he never read through the articles of incorporation; he didn't know he was doing business with Mr. Gilbert for the corporation, or that he was doing it as treasurer; he never attended or heard of a meeting of stockholders or directors; Gilbert said he was going to be president and he (*Spafford*) said nothing about it,—"things were moving pretty fast and we did this by common consent; did a lot of business in an informal way." It is certainly true that the corporation did, in this informal way, considerable business. It erected a sawmill, bought logs, manufactured 80,000 feet of lumber, contracted debts aggregating nearly $10,000, and had several thousand dollars worth of logs and material on hand when the Caleson contract was made.

We can reach no conclusion except that all parties con-

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sented to the doing of the business in just the way it was done; that it was in fact regarded by all parties rather as a partnership between Gilbert and *Spafford,* with Mrs. Gilbert as a nominal secretary and *Mr. Peyton* as a friendly banker with a slight interest, than as a real corporation.

Were we to pass upon the question as an original one we should have no difficulty in reaching the conclusion that *Mr. Spafford,* by his acts and general conduct, to all intents and purposes consented that business should be done just as it was done, and that Mr. Gilbert should manage the affairs of the business, make loans and give securities upon the corporate property. Apart from this, however, is the testimony of both the Gilberts to the effect that *Spafford* was consulted before the execution of the various securities in litigation here, and consented to them, and the finding of the court to the effect that the three instruments were executed and delivered by the authorized agents of the company. We construe this finding to mean that the Gilberts became such agents by consent of the parties interested, especially in view of the fact that in the opinion filed by the trial court he places his decision as to the validity of the contracts upon the ground that the corporation transacted its business in the manner in which it did with the knowledge and consent of all its stockholders. In this view of the case we do not reach the numerous and doubtful questions as to the powers of *de facto* officers of corporations, or the validity of transfers of property made by insolvent corporations on the verge of collapse. Where a number of people are jointly interested in the same enterprise they may, by consent, do many things which will be entirely valid and binding as between themselves which would not stand for a moment if the rights of third parties were involved. In this case the only rights involved are the rights of persons who have consented either impliedly or expressly to everything that has been done, and they cannot now be heard to complain.

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One further question of some difficulty is presented. The Caleson contract made August 25, 1908, was never filed in the town clerk's office, and hence cannot have effect as a chattel mortgage as against the levy made under the *Spafford* execution, unless actual possession of the property was taken by the plaintiff prior to the levy.

The complaint alleges that possession of the whole property was taken by the plaintiff on or about August 25, 1908, and has ever since been retained. The answer of the defendant *Spafford* alleges "that neither the plaintiff nor Eli Caleson ever had peaceable possession . . . of the mill, logs, or lumber, but that possession was taken and held against the protest of the defendant *Frank Spafford,* and not otherwise." This seems to be an admission that possession was in fact taken and held by the plaintiff; but, as the corporation itself is a party appellant and made answer denying the allegation of possession, it seems necessary to consider the question on the evidence. The court below concluded that Caleson's possession, taken early in September and retained until some time in December when the sheriff made his levy under the *Spafford* execution, was in legal effect the possession of *Peyton.* It seems to us that this conclusion was correct. By the Caleson contract the whole mill property was leased to Caleson until December 31, 1908, and the entire stock of logs and lath on hand was conveyed to *Peyton* as security for the company's indebtedness to him, and Caleson was authorized to manufacture the logs into lumber and lath under the supervision and control of *Peyton,* who was to pay the expenses of manufacture and then pay the indebtedness to himself, after which any balance remaining was to be paid by him to the corporation. As matter of fact there was practically no possibility of there being any surplus to be returned to the corporation. The whole beneficial interest in the logs was vested in *Peyton,* and he was given absolute control over them, Caleson being in actual possession as his agent or bailee

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for hire. The property was not capable of manual delivery, and we think that the delivery of the same to Caleson for the purpose of manufacturing the logs into lumber for the benefit of *Peyton* and under his control must logically be considered as a delivery to *Peyton,* and that Caleson's possession during such manufacture must be considered as *Peyton's* possession.

By the Court.—Judgment affirmed.

VINJE, J., took no part.

STATE EX REL. LAKE NEBAGAMON ICE COMPANY, Respondent, vs. MCPHEE, Village Clerk, Appellant.

February 22—April 3, 1912.

Taxation: Personal property: Ice cut and stored: Where to be assessed: Statutes: Construction: Amendment: Board of review: Valuation.

1. Ice cut and stored in an ice house is a commodity and is assessable as personal property.
2. The omission, in the later amendments to sec. 1040, Stats. (by ch. 191, Laws of 1901, and ch. 70, Laws of 1909), of the specific reference to "ice cut and stored" which had been inserted in that section by ch. 346, Laws of 1899, did not indicate an intention to exempt such ice from taxation, because sec. 1036, Stats. (Laws of 1899, ch. 346), classifying such ice as personal property, and the broad requirements of sec. 1040 as to the assessment of all personal property, remained unchanged.
3. Such ice is to be assessed in the district where located, under the third sentence of sec. 1040, Stats. (Laws of 1909, ch. 70), if kept there for sale, even though the owner resides in another district and negotiates sales in that other district, making shipments by rail from the place where the ice is located to purchasers in other parts of this state or in other states.
4. If not kept for sale in the district where located, such ice is nevertheless taxable in that district, under the fifth sentence of sec. 1040, Stats. (Laws of 1909, ch. 70).

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5. A mere opinion of the owner with reference to the value of personal property, unsupported by facts or circumstances and coupled with evasive answers as to the quantity and market value, does not so nullify the valuation of an assessor that the board of review is without jurisdiction to confirm the latter.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

The appeal is from a judgment reversing an assessment upon the personal property of relator.

For the appellant there was a brief by *Grace & Hudnall,* and oral argument by *Geo. B. Hudnall.*

C. R. Fridley, for the respondent.

TIMLIN, J. The relator is a domestic corporation having its principal office and place of business in the city of Superior and having on May 1, 1911, an ice house containing some 9,000 tons of ice in the village of Nebagamon. This ice was assessed for taxation by the village assessor at a valuation of $4,000 and so placed upon the assessment roll of the village. The president of the relator appeared before the board of review and testified that the value of the ice in question on May 1st was $1,825.25; that there was no market price on May 1st; that the relator put up 7,952 tons; that at the time of taking the ice out of the lake it was worth twenty-five cents per ton on board cars; that the capacity of the ice houses was 1,400 tons (14,000?) if filled up, but they were not filled up; the buildings were 142 by 200 feet with twenty-eight foot posts. There was some evidence taken that the relator sold ice in small quantities from these ice houses at ten cents per hundred pounds; also evidence relating to the capacity of the ice houses and to what extent they were filled and the number of tons therein. The board of review confirmed the assessor's valuation, and upon this writ of *certiorari* the circuit court reversed this action of the board.

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The appellant contends (a) that the ice was properly assessable in the village notwithstanding the location of the principal office and place of business of the relator was elsewhere; (b) that the relator offered no evidence sufficient to overthrow the assessor's valuation and require the board to accept the relator's valuation in preference to that of the assessor. Prior to the amendments hereinafter considered, sec. 1036, Stats. (1898), defined personal property to include, among other things there specified, "all goods, wares, merchandise, chattels, moneys and effects, of any nature or description, having any real or marketable value." Sec. 1040, Id., related to the place of assessment, and while the statutes stood thus they received a construction which would warrant this ice, if personal property, being assessed in the village if it was kept there for sale and shipment by railroad to other places, although the sales were made in Superior. *Valentine-Clark Co. v. Shawano Co.* 120 Wis. 310, 97 N. W. 915; *Torrey v. Shawano Co.* 79 Wis. 152, 48 N. W. 246; *Sanford v. Spencer,* 62 Wis. 230, 22 N. W. 465; *Mitchell v. Plover,* 53 Wis. 548, 11 N. W. 27. That ice stored in an ice house is a commodity can hardly be doubted. See COMMODITY, 2 Words & Phrases, 1309. There is nothing in the evidence before the board or in the relation for the writ to show whether the ice was kept at the ice houses for sale, except that it appears that during May, June, and July relator shipped 109 carloads therefrom, but to whom does not appear. So that under the law as it stood in the Statutes of 1898 there was nothing affirmatively shown to impeach the assessment as made in the wrong district. The construction given to sec. 1040, Stats. (1898), prior to the amendments out of which the present controversy arose is important to keep in mind in order to properly weigh the legal effect of such amendments. There can be and there is no question that the ice is assessable as personal property. That being so we must examine sec. 1040, as amended by ch. 70, Laws of 1909, to

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find the place of assessment. It is not the property of a non-resident or foreign corporation and therefore must fall within the first sentence of the section, which reads: "All personal property shall be assessed in the assessment district where the owner resides, except as otherwise provided;" or it must fall within the third sentence of the section, which reads: "Merchants' goods, wares, commodities kept for sale, tools and machinery, manufacturers' stock, buildings on leased land when such buildings are personal property, farm implements, cord wood, live stock, and farm products, excepting grain in warehouse, shall be assessed in the district where located;" or within the fifth sentence of the section, which now reads: "Saw logs, timber, railroad ties, lumber, and other articles, not being manufacturers' stock, shall be assessed in the district where located."

Prior to the enactment of ch. 70, Laws of 1909, controversies arose in several of the above cases with reference to whether certain personal property was assessable under the third or fifth sentence above quoted, because the fifth sentence at that time required the property therein described to be assessed where the owner or agent having the same in charge resided. The construction of sec. 1040 substantially as it reads in the Statutes of 1898 was settled in several particulars: (1) That the exception made in the first sentence above quoted took out of that part of the statute all personal property which was properly described as "merchants' goods, wares, and commodities kept for sale." Anything falling within this description was not included within the first sentence, requiring personal property to be assessed where the owner resides. *Mitchell v. Plover,* 53 Wis. 548, 11 N. W. 27. (2) That the fifth sentence was intended to cover only personal property of the kind therein described which was not kept at the place specified for sale, and was also taken out of the first sentence by the exception therein contained. (3) That the use of a specific description of property in the fifth sentence, instead

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of the more general description in the third sentence, did not take the property so mentioned out of the purview of the third sentence, provided such property was within the broader and more general terms of the third sentence and was kept for sale. *Ibid.; Washburn v. Oshkosh,* 60 Wis. 453, 19 N. W. 364. (4) That personal property is kept for sale in the district where it is located notwithstanding the owner resides in another district and negotiates the sales in that other district but delivers from the district where the property is located to purchasers in different parts of this state or in other states. *Valentine-Clark Co. v. Shawano Co.* 120 Wis. 310, 97 N. W. 915; *Torrey v. Shawano Co.* 79 Wis. 152, 48 N. W. 246.

While the law stood thus, ch. 346, Laws of 1899, amended both secs. 1036 and 1040, Stats. (1898), the former by inserting among the enumerated articles constituting personal property "ice cut and stored for use, sale or shipment," and the latter by inserting in the third sentence above quoted, after the words "commodities kept for sale," the words "ice cut and stored." This left such ice certainly assessable in the district where located. Ch. 191, Laws of 1901, purported to amend sec. 1040, Stats. (1898), by inserting after the words "manufacturers' stock," in the third sentence above quoted, the words "buildings on leased lands, when such buildings are personal property," so that said section when amended shall read as follows, etc. The amendment was incorporated into the statute without noticing or carrying in the amendment of the same section by ch. 346, Laws of 1899, thus omitting all specific reference to ice. There was no repealing clause, special or general, in this act of 1901.

The next amendment was by ch. 70, Laws of 1909, which purported to amend sec. 1040, Stats. (1898), to read, etc., here rewriting the whole section but not noticing either the amendment of 1899 or the amendment of 1901 above referred to. There was no repealing clause in this act. As thus rewritten in the amendment all specific reference to ice was omitted, and this amendment expressly changed the place of

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assessment of the property described in the fifth sentence of sec. 1040 from the district in which the owner resides to the district in which the property was located. Dropping out all reference to ice in these amendments cannot be held indicative of an intention to exempt ice from taxation, because the amendment to sec. 1036 above referred to, in which ice "cut and stored" is classified as personal property, remained unchanged, and the broad requirements of sec. 1040, requiring all personal property to be assessed in some assessment district, remained unchanged. *Nordean v. M., St. P. & S. S. M. R. Co.* 148 Wis. 627, 135 N. W. 150. The ice cut and stored, with reference to its place of assessment, must therefore fall within the first, third, or fifth sentences above quoted. Dropping the words relating to ice out by amendment could have this effect, no more. The third and fifth sentences as they now read specify the same place for assessment, namely, the district in which the property is located. This eliminates everything but the question whether or not the ice comes within the first sentence. It never was within that sentence. That sentence by its form continually casts it out. The construction heretofore given to that statute is that any personal property coming within the broad terms of the third sentence, and "kept for sale," is taken out of the first sentence by the exception contained in the latter. The amendment of sec. 1040 which dropped out of the third sentence the words relating to ice merely left that third sentence in this respect as it was before the words relating to ice were inserted by the act of 1899. If it was not "kept for sale" in the village, it merely dropped into the fifth sentence as other articles of the same genus, as saw logs or timber, viz., real property severed from the freehold and converted by labor into a marketable commodity. The ice in question was therefore properly assessed in the assessment district where located.

We are next to inquire whether the board of review acted without jurisdiction in confirming the assessor's valuation of $4,000. This latter valuation was before the board of review

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and sufficient to sustain its action in confirming the same unless impeached or overthrown by testimony on the part of the relator sufficient for that purpose. A mere opinion of the owner with reference to the value of personal property, unsupported by facts or circumstances and coupled with evasive answers as to the quantity and market value of the personal property in question, while worthy of consideration by the board of review, cannot be held to so nullify the assessor's valuation that the board is without jurisdiction to confirm the latter. This rule is, we think, justly deducible from the following cases: *State ex rel. Giroux v. Lien,* 108 Wis. 316, 84 N. W. 422; *State ex rel. Vilas v. Wharton,* 117 Wis. 558, 94 N. W. 359; *State ex rel. J. S. Stearns L. Co. v. Fisher,* 124 Wis. 271, 102 N. W. 566; *State ex rel. Edward Hines L. Co. v. Fisher,* 129 Wis. 57, 108 N. W. 206; *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to affirm the action of the board of review.

MILWAUKEE COUNTY, Appellant, vs. HALSEY, Respondent.

February 24—April 3, 1912.

Constitutional law: Statutes: Construction: Repeal: Validity: Special, private, and local acts: Circuit courts: Salaries of judges: Classification: Requiring part of salary to be paid by county: Uniformity in county government: Taxation.

1. Where a statute is fairly susceptible of two constructions, that one is to be preferred which will leave it valid and constitutional, rather than one which defeats it.
2. The $400 allowed to each circuit judge by ch. 263, Laws of 1889, for "his necessary expenses while in the discharge of his duties" was not a part of the "compensation" of such judge

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within the meaning of sec. 26, art. IV, Const.; and the "excess over the compensation of other circuit judges," which by ch. 377, Laws of 1897, was to be paid to the judges of the Second judicial circuit by the county of Milwaukee, was the difference ($1,400) between the salary of other circuit judges and the salary fixed for the judges in said Second circuit.

3. Ch. 138 and ch. 414, Laws of 1901, fixing the salaries of circuit judges at $4,000, with an additional allowance for expenses, and repealing all acts and parts of acts in conflict therewith, did not affect the salaries of the judges in the Second circuit as fixed by ch. 377, Laws of 1897, but only the salaries of such judges as were before fixed by ch. 12, Stats. (1898), which the said acts purported to amend; and the excess to be paid to judges of the Second circuit by Milwaukee county was thereby reduced to $1,000.

4. A law relating to the salaries of one class of circuit judges does not in any way conflict with a law fixing the salaries of another and different class.

5. Repeals by implication are not favored; and a general clause repealing all conflicting acts or parts of acts does not repeal other acts relating to the same general subject unless there is an actual conflict.

6. The fact that the legislature afterwards recognizes a law as being in force tends to show that it was not the intention to repeal it at a previous session; but is not conclusive.

7. Ch. 520, Laws of 1905, which provides that "the judges of the circuit courts shall receive as salary, in addition to the amount now received, the sum of $600 per annum," was an independent enactment and applied to all circuit judges including those in the Second circuit.

8. A statute relating to the creation, tenure, and salary of a state officer, such as a circuit judge, or creating, or regulating the administration of public justice by, a court of general common-law and equity jurisdiction within a judicial circuit, is neither special, private, nor local in the constitutional sense.

9. The mere fact that in a judicial circuit consisting of a single county a statute creates a charge upon such county for part of the salary of the circuit judge or judges, does not make the law a part of the system of county government so as to render the constitutional rule of uniformity applicable; and the fact that the county is mentioned by name in the act is unimportant.

10. Such an act does not contravene the constitutional requirement that the rule of taxation shall be uniform.

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11. Counties having a population of 100,000 or more, each constituting a single judicial circuit, have the characteristics of a class in numbers, in wealth, in amount of litigation therein, in the extra expense which they cause to the state, and in the advantages they receive from having the circuit court of several judges constantly within their boundaries, which furnish a sufficient reason for imposing upon such class a share of the expense of administering justice, from which other counties are exempt.

BARNES, J., dissents.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to a complaint and stipulation of facts.

For the appellant there were briefs by *Winfred C. Zabel,* district attorney, and *William L. Tibbs,* assistant district attorney, and oral argument by *Mr. Zabel.*

For the respondent there was a brief by *Thomas W. Spence* and *Geo. P. Miller,* and oral argument by *Mr. Miller.*

TIMLIN, J. The complaint shows that the defendant is circuit judge of the Second judicial circuit and entered upon a term on April 2, 1901, and again entered upon a term of six years on the 1st day of January, 1906, and received from the state of Wisconsin an annual salary of $4,000, and in addition, as salary or compensation, other moneys from *Milwaukee County* amounting to $250 per quarter or $1,000 per year. It is contended that these latter payments were illegal and the action is brought to recover the money so paid by the county.

Two questions arise: (1) What statutes are in force and their meaning? (2) Are the statutes, when given their true meaning, unconstitutional? These questions are interrelated because of the rule that, where a statute is fairly susceptible of two different constructions, that which will leave the statute valid and constitutional is to be preferred.

Prior to the amendment to the constitution ratified in April, 1897, there was but one class of judicial circuits and

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one class of circuit judges in this state. Five judicial circuits were created by the constitution, but the legislature was given power to increase the number of circuits, bounding such circuits by county lines, not, however, so as to legislate a judge out of office, and the minimum salary of the circuit judges was fixed. The circuit judges were to receive no fees of office or other compensation than their salaries. Const. art. VII. While the constitutional provisions stood thus there was enacted and in force ch. 12, R. S. 1878, "Of Salaries and Permanent Appropriations," which fixed the annual salaries of judges of the circuit court at $3,000 each. Ch. 246, Laws of 1885, raised this salary as to the judges thereafter elected to $3,600 annually, and ch. 263, Laws of 1889, provided that each of the several judges of the circuit courts in this state should receive the sum of $400 per annum as and for his necessary expenses while in the discharge of his duties as such judge, in addition to the salary then provided by law, and that the act should apply to the several judges then in office. It may be observed in passing that in addition to the explicit provisions of this statute to the effect that the allowance there made is for expenses and in addition to salary, the act would be invalid on its face if we should consider the allowance there made "compensation" within the meaning of that word in sec. 26, art. IV, Const., which provides that the compensation of a public officer shall not be increased or diminished during his term of office. The substance of these statutes, condensed, rewritten, but without material change, was carried into the Statutes of 1898, where it appears in ch. 12 in these words:

"The judges of the circuit courts, three thousand six hundred dollars each, and in addition thereto each judge shall receive the sum of four hundred dollars per annum as and for his necessary expenses while in the discharge of his duties, such amount to be paid quarterly."

This revision was enacted and approved August 20, 1897, to go into effect September 1, 1898. The statutes revised and condensed in the Statutes of 1898, viz.: R. S. 1878, ch. 246,

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Laws of 1885, and ch. 263, Laws of 1889, were expressly repealed on August 20, 1897, such repeal to take effect September 1, 1898. On the same day, viz., August 20, 1897, there was approved, and on August 23d published, ch. 377, Laws of that year. This recited the recent constitutional amendment to the effect that in any circuit composed of one county only, which county contains a population of 100,000 or over, the legislature might from time to time authorize additional circuit judges to be chosen. By this amendment every circuit judge was also required to reside in the circuit from which he is elected and to hold his office for such term and receive such compensation as the legislature should prescribe. It was then recited that the Second judicial circuit was composed of *Milwaukee County,* containing more than the required population, and that there was need of an additional circuit judge in that circuit. It was then enacted that an additional circuit judge be elected in this circuit and his election and term of office provided for. Then occurs the following sentence in the third section of the act:

"The judges of the Second judicial circuit shall, on and after January first, A. D. 1900, receive a salary of five thousand dollars per annum payable as other circuit judges are paid, provided that the excess over the compensation of other circuit judges shall be paid by the county of *Milwaukee* in the same manner as the compensation of judges of the superior court is paid."

It so happened that the term of Hon. D. H. JOHNSON, the sitting single judge of the Second circuit, would expire January 1, 1900, and the term of the additional judge provided by the act would commence on or after that day. The judges of the superior court of *Milwaukee County* were paid quarterly by *Milwaukee County.* We give to the word "compensation" found in this act the same meaning which the word has in the state constitution, sec. 26, art. IV, sec. 10, art. VII, sec. 5, art. V, sec. 2, art. VI, sec. 3, art. VI. The "compensation"

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of other circuit judges did not include the reimbursements provided for by ch. 263, Laws of 1889, because to hold otherwise would give this word a meaning different from its manifest meaning in the constitutional provisions above referred to and would convict the legislature of passing an unconstitutional law when it enacted ch. 263, *supra,* and because that act itself expressly distinguished the sum so awarded from salary, while in the constitution the words "salary" and "compensation" are employed synonymously. The "excess over the compensation of other circuit judges" was therefore at this time the excess of $5,000 over $3,600 or $1,400.

At the next session of the legislature, chs. 138 and 414, Laws of 1901, were enacted, and these acts raised the salaries of judges whose terms should thereafter (May 14, 1901) commence, and again distinguished between the salary and the allowance for expenses. These acts last mentioned purported to amend only ch. 12, Stats. (1898), and repealed all acts and parts of acts in conflict with their provisions. They did not in words amend or purport to amend or repeal ch. 377, Laws of 1897, relating to the judges of the Second circuit, and they did not raise the salary of these judges, but did raise the salary of all such judges whose salaries were fixed by ch. 12, Stats. (1898), from $3,600 to $4,000 per annum, and consequently diminished the "excess" above mentioned from $1,400 to $1,000. The judges of the Second circuit acquiesced during their first terms in that construction of ch. 377, Laws of 1897, which made the "excess" which they were to be paid by *Milwaukee County* only $1,000, and thereafter both parties acquiesced in a construction of these statutes which would exclude this $400 for expenses. In other words, the judges of the Second judicial circuit continued to receive from the county $1,000 per year. We do not consider ch. 377, Laws of 1897, repealed by the general clause repealing all acts or parts of acts which in any way conflict therewith, found in

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chs. 138 and 414, Laws of 1901. A law relating to the salaries of one class of circuit judges does not in any way conflict with a law fixing the salaries of another and different class. There is no necessary antagonism or conflict. If sec. 170, ch. 12, Stats. (1898), and ch. 377, Laws of 1897, stood together and were not in conflict prior to the enactments of 1901, it is hard to see how they became in conflict by reason of the enactments of 1901. Repeals by implication are not favored, and it has been decided that a general repealing clause like this did not repeal other acts relating to the same general subject unless there was actual conflict between the statutes. *Simmons v. Bradley,* 27 Wis. 689; *Lewis v. Stout,* 22 Wis. 234. Besides, ch. 377, Laws of 1897, was long after and by ch. 2, Laws of 1903, by the legislature recognized as in force. *State ex rel. Gates v. Comm'rs of Public Lands,* 106 Wis. 584, 82 N. W. 549. This, however, is not conclusive; only a makeweight. *Walworth Co. v. Whitewater,* 17 Wis. 193; *Janesville v. Markoe,* 18 Wis. 350.

Ch. 520, Laws of 1905, then came into existence in these words:

"The judges of the circuit courts shall receive as salary, in addition to the amount now received, the sum of six hundred dollars per annum, payable quarterly, out of the state treasury."

Can this be limited to judges outside of the Second circuit or does it apply to all the circuit judges of the state of both classes, so that those outside of the Second circuit who were then receiving $4,000 yearly should be entitled to $4,600, and those who were receiving $5,000 yearly should be entitled to $5,600, thus leaving the excess of the salaries of the judges of the Second judicial circuit to be paid by *Milwaukee County,* still $1,000? We are satisfied that this act must be applied to all circuit judges, adding to the amount "now received" by each. It is an independent enactment, contains no reference

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to any prior statute, refers to existing conditions of fact, and uses words applicable to all circuit judges in the state. We perceive no reason apparent upon the face of the statute for restricting its provisions to a single class. If we endeavor to apply it to one class, which class shall that be? If we apply it to all circuit judges, we cannot disregard the words "in addition to the amount now received." By no permissible construction of pre-existing statutes were all the circuit judges of the state in 1905 receiving equal salaries, so that we must hold that each class had by this act $600 added to the salary its members were then receiving.

Counsel for appellant further contends that ch. 377, Laws of 1897, is unconstitutional, and hence that the retention of the excess salary from the county cannot be justified. He contends (a) it violates sec. 23, art. IV, of the constitution, which provides that the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable; (b) it violates subd. 6 of sec. 31, art. IV, Const., which prohibits the legislature from enacting any special or private law for assessment and collection of taxes; (c) it violates sec. 1, art. VIII, which provides that the rule of taxation shall be uniform, and taxes shall be levied on such property as the legislature shall prescribe; (d) it violates sec. 18, art. IV, which provides that no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title. It is quite rare to find and would be quite difficult to devise a statute which would conflict with so many different provisions of the constitution. We must not fall into the error of seeing a conflict with one requirement of the constitution merely because we cannot readily trace its conflict with another. But it seems very patent to us that a law like this, relating to the creation of, tenure of, and salary of a state officer whose jurisdiction is in many matters coextensive with the boundaries of

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the state, cannot be said to be either special, private, or local. Nor could a law creating, or regulating the administration of public justice by, a court of general common-law and equity jurisdiction within a judicial circuit be considered special, private, or local.

We next consider the constitutional provision with reference to the singleness of system and uniformity of county government. The statute in question does not relate to the system of county government. It deals with an office, its term, and its salary, which is not a county office, and the mere fact that the statute creates a charge upon the circuit for part of the salary of the circuit judge and that circuit is coterminous with the county does not make the law a part of county government. That the county is mentioned by name in the act of 1897 is unimportant. There is no such restriction applicable as in the case of amending a city charter. To call the circuit a county or the county a circuit for the purpose of identifying it for regulation or burden can make no substantial difference. A law prescribing the manner of raising or securing funds for the building of a court house does not relate to the system of county government. *Milwaukee Co. v. Pabst,* 45 Wis. 311. See, also, *State ex rel. Graef v. Forest Co.* 74 Wis. 610, 43 N. W. 551; *Rock Co. v. Edgerton,* 90 Wis. 288, 63 N. W. 291; *State ex rel. Marinette, T. & W. R. Co. v. Tomahawk,* 96 Wis. 73, 71 N. W. 86; *State ex rel. Busacker v. Groth,* 132 Wis. 283, 112 N. W. 431; *State ex rel. Scanlan v. Archibold,* 146 Wis. 363, 131 N. W. 895. The statute in question relates to an institution of the state recognized by the constitution and provided for therein for the exercise of the judicial function of the general government and has no relation to the system of county government.

It is next argued that imposing upon one county the duty of paying a part of this salary contravenes the constitutional command that the rule of taxation shall be uniform. This is

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quite a far-reaching claim. It is not claimed that there is any express limitation in the constitution other than those referred to. From the beginning counties have been required to aid in the administration of public justice by providing court houses, jails, paying the salaries of clerk and district attorney, paying counsel fees of indigent persons accused of crime, and there are several judgments affirmed in this court against counties for the expenses and disbursements of other counties in civil and criminal trials of causes removed from the first county for trial in the latter. These judgments rest upon valid statutes. *Winnebago Co. v. Dodge Co.* 125 Wis. 42, 103 N. W. 255; *Williams v. Dodge Co.* 95 Wis. 604, 70 N. W. 821. The county may be required to pay the fees of *quasi*-judicial officers in tax matters, *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797; of reviewing assessments, *State ex rel. Williams v. Samuelson,* 131 Wis. 499, 111 N. W. 712; the expenses of a criminal trial held outside the county, *Waushara Co. v. Portage Co.* 83 Wis. 5, 52 N. W. 1135; the expenses of trials held within the county of cases arising in another county annexed to it for judicial purposes, *Crawford Co. v. Iowa Co.* 2 Pin. 368. A number of instances will be found in the note to *Jefferson Co. v. Besley,* 5 Wis. 134, Dixon's Notes. Counties have been required to pay the salaries and bear the expenses of municipal or inferior courts, the judges of which are certainly not county officers. *In re Bergin,* 31 Wis. 383; *Shaffel v. State,* 97 Wis. 377, 72 N. W. 888; *American L. & T. Co. v. Bond,* 91 Wis. 204, 64 N. W. 854; *State ex rel. Le Clair v. Wright,* 80 Wis. 648, 50 N. W. 894. Counties have been required to contribute to other public purposes besides the administration of justice, as for illustration the construction or repair of a bridge within a town in the county when the cost of the bridge or repairs will exceed one fourth of one per cent. of all the taxable property of the town, although certain cities and villages within the same

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county are exempted. *State v. Sauk Co.* 70 Wis. 485, 36 N. W. 396. In *Jensen v. Polk Co.* 47 Wis. 298, 2 N. W. 320, at page 310 it is said:

"It was held by this court that a special act granting power to one county to aid in the construction of a railroad did not violate this rule of uniformity [county government]; and if it did not, it is difficult to see how an act which compels the county to aid in opening a highway in such county can be unconstitutional for that reason."

And speaking of the uniform rule of taxation the court said:

"The fact that one county, town, or city is burdened with a greater weight of taxation than another, is not a violation of the rule of uniformity. If it were, there would be no lawful tax levied in the state, as nearly every municipality raises a different amount of taxes upon the same amount of taxable property, the amount depending upon the necessities of the municipality or the will of its officers. If it be claimed that it would violate the rule of uniformity because other counties do not pay taxes for the opening of state roads, the rule of uniformity, if any, violated would not be the uniformity of taxation, but of the system of county government."

If there can be no valid objection based upon the nature of the governmental function exercised by circuit judges, can any substantial distinction be drawn between contributing to the salary of the circuit judge and contributing to the other necessary expenses of the administration of justice as in the cases above cited? The distinction, if any, between requiring a county to pay part of such expenses, consisting of the sheriff's, clerk's, referee's, and jurors' fees incurred by another county, and paying part of the salary of the circuit judge, seems very shadowy and unsubstantial. If it be placed upon the ground that a county may be required to pay part of the expenses of administering justice in all controversies, civil and criminal, originating within the county wherever tried, the same can be said of the act of 1897 requir-

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ing *Milwaukee County* to pay part of the salary of the circuit judge. But enough has been said to show that there is nothing in the nature of the governmental function exercised which prohibits the legislature from casting a portion of the expense of performing it upon the county.

Nor is there any objection to the imposition of this charge upon *Milwaukee County* found in the fact that other counties of a different class are not required to make such contribution to the expense of maintaining courts. Under this rule of uniformity of taxation it has never been doubted that classification is permissible, at least to the extent of entirely exempting one class and placing an uniform burden upon another. *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557; *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833. Counties of 100,000 population or more constituting a single judicial district have the characteristics of a class in numbers, in wealth, in the amount of litigation therein, in the extra expense which they cause to the state, and in the advantages they receive from having the circuit court of several judges constantly within their boundaries. In *Crawford Co. v. Iowa Co.* 2 Pin. 368, it was considered, following *Hampshire Co. v. Franklin Co.* 16 Mass. 76, that the advantage of having a circuit court held within the boundaries of a county furnished a sufficient reason for the legislature imposing upon the latter county the expenses of holding court therein for the trial of cases originating elsewhere. There are many such local benefits or advantages. Such as reviewing local administrative acts or ordinances, acting as county judge (sec. 2447, Stats. 1898), acquiring title to toll roads (sec. 1311*a,* Id.), appointing commissioners to equalize assessments, or in local condemnation matters, etc., besides the advantage to suitors residing in the county. Besides, while a statute classification must be germane to the object sought to be accomplished by the statute, we have in the instant case a constitutional classification of circuits and circuit judges in this state by the con-

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stitutional amendment of 1897, and such classification requires no aid of that kind to uphold it so long as it does not transgress the federal constitution. So without deciding that the legislature can or cannot impose upon particular counties the duty of paying part or all the expenses of the administration of state affairs by contributing to or paying in whole the salary of the state officer engaged in such administration, we find ample authority in the law for the uniform imposition upon a designated class of counties of the expenses of judicial administration with reference at least to causes originating in such counties. This is enough to support the legislation in question.

We find nothing in *Lund v. Chippewa Co.* 93 Wis. 640, 67 N. W. 927, in conflict with this conclusion. That was an action by a taxpayer, and, whether the legislation attacked was mandatory or permissive, either would defeat his action. The court held that it was at least permissive and in so doing assumed its invalidity as a mandatory statute. If we continue that assumption, still we must recognize a difference between a state asylum, which offers no privileges or advantages to the residents of the county in which it is located except the remote advantages of visiting unfortunate nonresident friends or relatives who may be confined therein, and a circuit court, which has from the origin of our state been recognized as an advantage to the county in which it is held and the expenses of which have in large part been absolutely imposed upon the counties in which the legal controversies arose from the beginning of our political existence, as shown by the cases herein cited. In short, we are obliged to set the cases of *Winnebago Co. v. Dodge Co., supra,* and *Waushara Co. v. Portage Co., supra,* and such like cases, against *Lund v. Chippewa Co., supra,* and ascertain whether there is any conflict between them. We find none when the subject of the legislation in each case is taken into consideration.

It follows that the county has shown no right of recovery

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against the defendant, and the demurrer was properly sustained.

By the Court.—Order affirmed, and the cause remanded for further proceedings according to law.

The following opinion was filed May 11, 1912:

BARNES, J. (*dissenting*). I am unable to concur in all that is said in the opinion in this case. A circuit judge is just as much a state officer as is the governor, secretary of state, attorney general, state treasurer, a justice of this court, or a state senator. When all is said in the opinion that can be said in support of the acts that are challenged, we have the bare, bald question of the right of the legislature to single out a single county or a single circuit and arbitrarily compel it to pay a part of the salary of a state officer, when no other county or circuit in the state is required so to do. If this can be done I see no good reason why Dane county could not be obliged to pay the whole or a part of the salary of the governor or of the other state officers mentioned, or why any single senatorial district might not be called upon to pay the salary of the senator who represented it. Under the law which has been upheld the *County of Milwaukee* is compelled to levy $6,000 a year to assist in paying the salaries of state officers, while no other county or circuit in the state is mulcted with any such charge. This is not my idea of uniformity of taxation. I do not think that the cases of *Winnebago Co. v. Dodge Co.; Williams v. Dodge Co.; State ex rel. Ellis v. Thorne; State ex rel. Williams v. Samuelson; Waushara Co. v. Portage Co.,* and others cited in the opinion furnish any support for the conclusion reached in the instant case. All of these cases arose under general statutes applicable to the entire state and to every county therein. None of them singled out a certain county and required it to bear an extra portion of the general burden of taxation. This was the precise thing

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which the court held could not be done in *Lund v. Chippewa Co.* 93 Wis. 640, 67 N. W. 927.

I freely concede that the legislature had the power to authorize the county to make the expenditure if it saw fit. The *Lund Case, supra,* and *Jensen v. Polk Co.* 47 Wis. 298, 2 N. W. 320, so hold. But there is a wide difference between saying to a county, you may make a donation for the benefit of the general public if you see fit, and saying you must do so. So I think the *County of Milwaukee* had the right to pay the additional compensation to the judges as long as it saw fit and to cease doing so whenever it chose.

COLLE, Administratrix, Appellant, vs. KEWAUNEE, GREEN BAY & WESTERN RAILROAD COMPANY, Respondent.

March 12—April 3, 1912.

Appeal: Record: Curing defects: Co-operation of counsel: Hearing on merits: Delays not favored: Relief against mistakes, etc.: Terms: Bill of exceptions: Settlement: Extension of time: Motion for new trial: Stay of proceedings: Judgment: Vacating.

1. Where an appeal to the supreme court has been properly taken, but the record is imperfect or defective, reasonable time will in general be given, upon reasonable terms, to cure all curable defects; counsel for the respective parties will be expected to co-operate in that regard without adversary motions, delays, or needless costs; and the court will, if necessary, act upon its own initiative to perfect the record sufficiently to enable it to decide an appeal upon the merits, or will so decide it regardless of mere informalities.
2. Mistakes or inadvertences will not, in such a case, be permitted to deprive a party of the opportunity to have his case heard and determined on its merits and with as little delay as practicable; and all attempted interferences with such consideration of a disputed matter rightfully brought here will, unless founded on some substantial reason, be useless.

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3. The court will, however, endeavor to make relief from negligence or mistake subject to such terms as may be just and necessary to promote professional discipline and attention to the performance of duty.
4. A motion for a new trial, not "made in open court and entered in the clerk's minutes" as provided in Circuit Court Rule XXXIII, does not operate as a stay of proceedings; and it seems that it cannot so operate, even when made and entered as provided in that rule,—sec. 2861, Stats. (1898), being mandatory to the effect that the clerk, in case of a verdict, shall enter judgment, in the absence of some judicial direction to the contrary.
5. Although, strictly speaking, sec. 2861, Stats. (1898), does not apply where the verdict so finds the facts as to render an order for judgment necessary, yet the spirit of it is that there shall be no delay after verdict by reason of a motion for new trial, unless by order of court.
6. A motion, made five months after notice of the entry of judgment, to vacate the verdict and judgment and grant a new trial or to extend the time for settling a bill of exceptions, was properly denied, no particular reason for vacating the judgment being assigned except that its entry was an irregularity because, it was claimed, a motion for a new trial had operated as a stay, and there being no satisfactory explanation of the delay and no showing of a good-faith purpose to appeal because of supposed prejudicial error. KERWIN and TIMLIN, JJ., are of the opinion that the good faith of counsel in such matters should be presumed.

APPEAL from an order of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

There was a verdict for defendant June 16, 1910. Several days thereafter plaintiff's counsel filed a motion for a new trial. It was entered on the court record and a copy was served on defendant's attorney; but it was not brought to the court's attention or entered on the court journal, nor was there any formal stay of proceedings to give time for hearing it or settling a bill of exceptions. After considerable delay, defendant's attorneys, by written communication, suggested to plaintiff's attorneys that the circuit judge and the attorney having special charge of the case for defendant were about to

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go away for a considerable period of absence, precluding opportunity for bringing up the motion for a hearing before expiration of the time for taxing costs; and submitted a stipulation extending such time, to be signed by plaintiff's attorneys if they desired delay in the entry of judgment. The proposition was not favorably responded to, plaintiff's attorneys supposing the mere filing of the motion for a new trial would operate as a stay. Upon plaintiff's attorneys so deciding defendant's attorneys proceeded, in due course, to tax costs and perfect judgment. That was done; plaintiff's attorneys filing objections. Two days thereafter notice of the entry of judgment was served on plaintiff's attorneys. Some five months thereafter, they moved the court to vacate the verdict and judgment and grant a new trial, or to extend the time for settling a bill of exceptions; basing the same on the filed papers in the case and affidavits served showing the facts stated. The motion was denied and plaintiff appealed.

The notice of appeal and undertaking are in due form. The cause was placed on the August calendar of this court and continued by stipulation. When it was reached for a hearing on the January calendar, objection was made thereto upon the ground that the return was defective. The court reached the conclusion that the defect complained of existed and thereupon granted a motion on behalf of plaintiff for time to cure the imperfection and remanded the record to the clerk of the circuit court for Brown county for that purpose. Such clerk, in due time, retransmitted the papers to this court without change. The difficulty was in the papers not being so attached together and certified as to show, definitely, that they were the papers upon which the motion for the order appealed from was grounded. The order recited that it was, in part, granted on an affidavit by one Handyside, clerk of the circuit court for Marinette county, where the motion was heard at special term of the court for Brown county. No such affidavit or copy thereof appeared among the papers. Upon the

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cause again being called for a hearing, counsel for defendant objected thereto, as before, and moved for a dismissal of the appeal. In the colloquy between counsel and the court in respect to the matter, it was conceded that all papers affecting the appeal were present except Mr. Handyside's affidavit. Proof was made that such affidavit was not on file; that no copy thereof was ever served on plaintiff's attorneys, and that neither the clerk of the court or such attorneys had been able to obtain a copy for the purpose of filing the same. Whereupon the court ordered that the case should be submitted and the record perfected pending the decision thereof. Thereafter, defendant's counsel furnished the court a copy of the Handyside affidavit. Later counsel for the respective parties filed with the court a written stipulation that such copy should be considered as a part of the record in place of the original and that the appeal should be decided as if a proper clerk's certificate was appended to the record.

The Handyside affidavit does not disclose anything material to the appeal not contained in other papers. It affirms that there was no stay of proceedings when the costs were taxed and that the first motion for a new trial was not made in open court or entered on the court journal.

The record includes an opinion by the circuit judge, rendered upon deciding the motion to vacate the verdict and judgment, which recites that, such motion was denied upon counsel for the plaintiff stating to the court that they had no argument to make or reason to urge why the motion should be granted; that the mere filing of a motion for a new trial did not preclude defendant's counsel from proceeding, as they did, to tax costs and to perfect judgment; that the motion for additional time to serve the bill of exceptions was denied because no sufficient excuse was given for not serving a proposed bill within the time allowed by law. No excuse was offered for delay in serving a proposed bill of exceptions except that counsel relied upon the filing of the motion for a stay and

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upon being able to secure a vacation of the judgment for irregularity in entering it before the motion was disposed of.

For the appellant there was a brief by *J. Elmer Lehr* and *Gill, Barry & Mahoney,* and oral argument by *A. R. Barry.*

For the respondent there was a brief by *Greene, Fairchild, North & Parker,* and oral argument by *H. O. Fairchild.*

MARSHALL, J. Counsel for the respective parties, at the court's suggestion, having joined in completing the record as regards the missing affidavit and waiving defects in the certification of the papers here, the appeal might be disposed of on the merits without discussing questions raised on the motion to dismiss. However, the time seems opportune for stating, definitely, the policy of the court as to such errors as, a defective clerk's certificate, failure to so arrange the papers as to show, definitely, to what the certificate relates and connect them with the subject for consideration, omission of some paper, and other imperfections which occur at times, giving rise to a motion to dismiss and delay for a remission of the record for correction and re-return of it, which, commonly, only operates, in the end, to waste the time of this court, increase the cost of litigation to one or both sides, and to uselessly, and often prejudicially, impede the administration of justice.

It has come to be the settled policy here to reduce the suggested interferences to the minimum and to expect that members of the profession will regard it to be their duty to clients and the court to aid in making such policy as efficient as practicable, to the end that judicial and professional energy may be concentrated solely upon discovering and vitalizing the real right between adversary parties.

True, as counsel for respondent confidently contended in support of the motion to dismiss because of defects in the record, that disposition of the matter was required if the rule in *Glover v. Wells & M. G. Co.* 93 Wis. 13, 66 N. W. 799, and

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Hoffman & B. Mfg. Co. v. Burdick, 95 Wis. 342, 70 N. W. 470, were to be adhered to.

There was doubt soon after the rule mentioned was announced, as to defects of the nature suggested being jurisdictional and the propriety of dismissing an appeal for such defects without giving opportunity to perfect the record. So in *Tenney v. Madison,* 99 Wis. 539, 75 N. W. 979, instead of the summary way being followed, time was granted to remove the imperfections, as was done in this case. However, later, in *Schomberg H. L. Co. v. Engel,* 114 Wis. 273, 90 N. W. 177, there was a return to such summary method, and, still later, in *Milwaukee T. Co. v. Sherwin,* 121 Wis. 468, 98 N. W. 223, 99 N. W. 229, there was a repetition thereof, the result being more definitely than ever put on the ground of jurisdictional defect. The rule was referred to in a way to indicate that it was one of much severity and that negligence or mistake giving rise to an application of it was such as to merit quite severe penalties as a condition of relief.

The course indicated was, perhaps, a logical result of *Glover v. Wells & M. G. Co., supra,* and cases referred to therein,—*Bowen v. Malbon,* 20 Wis. 491; *Carpenter v. Shepardson,* 43 Wis. 406, and *Bunn v. Valley L. Co.* 63 Wis. 630, 24 N. W. 403,—though it should be noted that it was not till the last instance that the court came to treat mere defects in the manner of certifying the record to this court as strictly jurisdictional error. In the first, the court affirmed the result below because, the record not being complete, it was presumed that, if it were so, it would support the determination complained of. The same course was taken in the last, while in the other the order here was for a dismissal, unless the record were perfected within thirty days, because, in its then state, the matter in controversy could not be considered on the merits.

Thus, it will be seen, the definite practice to dismiss for want of jurisdiction, because of defects in the record, not

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having to do with the notice of appeal or undertaking, was not adopted for over thirty years after the court commenced dealing with such difficulties. The trend seems to have been to greater and still greater strictness, according to the harshness of common-law practice, instead of harmonizing with the liberal spirit of the Code, that the doors of the court shall open easily to any one in good faith seeking a remedy for a wrong existing or threatened; that no inconsequential mistake nor any negligence, not affecting injuriously the adverse party, shall even tend to close them, and that a party shall not, necessarily, suffer, irrelievably, from the negligence or mistake of counsel or officers of the court or himself; the dominating thought, at all points, being to administer justice so as to accomplish the purpose of judicial administration.

Appreciating that, under the statute creating the right of appeal and the adjudications respecting the matter, well illustrated by *Harrigan v. Gilchrist,* 121 Wis. 127, 212, 99 N. W. 909,—a mere defective return could not well be considered as involving jurisdictional error in case of the appeal having been properly taken, and that the manner of treating such a defect and others including such as existed in this case, is purely a matter of judicial administration and control,—the existing practice was practically superseded by the spirit if not the letter of the new rules to the effect that, in general, parties will be given reasonable time upon reasonable terms to cure all curable defects in the record. Under such change of policy the uniform course has been to do so and call upon counsel for the respective parties to co-operate in that regard without adversary motions, delays, and needless costs. To that end attention has been turned to preventing any substantial advantage being afforded to the side seeking to profit by such a defect. In most any such case, counsel can, easily, surmount the difficulty by treaty and thus best serve their clients. The court will look with favor upon efforts to do so, with disfavor upon refusals to make such effort upon the one side or

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co-operate on the other, and, if necessary, will use its ample power to protect litigants, so far as practicable, from destructive consequences in case of mistake of counsel or officers or otherwise. The case will not often arise where counsel can well expect to gain any worth-while advantage by failing to co-operate, as indicated, or hesitating to do so.

Following the course suggested, the first motion to dismiss in this case was denied without costs, and the papers ordered returned to the clerk of the circuit court, to afford appellant's counsel opportunity to perfect the record. Upon the matter coming up again after re-return of the imperfect record, the second motion to dismiss was denied without costs and the cause ordered argued and submitted, with the intimation that the court would exercise its authority, on its own initiative if necessary, to sufficiently perfect the record to enable it to decide the appeal upon the merits. That took counsel by surprise, to their prejudice as they seemed to suppose, because they had placed such reliance upon competency to obtain the dismissal as to omit printing, serving, or filing a brief on the merits.

The court took the somewhat summary method of making progress in the litigation, because it appeared, satisfactorily, that a little mutual effort by counsel would easily remove any meritorious ground for dismissal. That the court was warranted in that view, is evidenced by the fact that such effort was successfully made, in compliance with judicial suggestion, and counsel are to be commended therefor. Distinction can be gained by taking that course, in general, without any judicial coercion, though the court will not hesitate to apply the latter where justice seems to demand it. No litigant will be permitted to lose opportunity of having his case heard and determined on its merits, and that too with as little delay as practicable, by mistake or inadvertence, or the adverse party to gain any advantage by casting hindrances in the way of that result. The spirit of the Code as voiced in sec. 2829 of

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the Statutes, emphasized by ch. 192, Laws of 1909, will be vitalized here to the fullest extent intended by the givers of the written law, to the end that the court may respond as fully as possible, in fact as well as in theory, to the conception of our system that it shall afford justice between adversary parties so far as human wisdom can accomplish that result. All attempted interferences with consideration of a disputed matter on the merits which may rightfully be brought here, unless founded on some substantial reason, will be useless, though the court will endeavor to make relief from negligence or mistake subject to such terms as may be just and necessary to promote professional discipline and attention to the performance of duty.

We may well add, in harmony with the foregoing, that, aided by the concession of counsel on the argument of the motion to dismiss, that all papers were here except the Handyside affidavit and that the paper transmitted after argument was a copy thereof, the court would not hesitate, regardless of consent of counsel, to dispose of the appeal on the merits notwithstanding the mere informality of the clerk's certificate and the very negligent manner in which the papers were returned. Even without such copy such course would probably be taken since there are clear indications in the papers of the right of the matter and because of the presumption which exists in favor of an order or judgment complained of, in case of the complete record upon which it is based not being here properly certified.

Coming to the merits, we are unable to find any worthy of extended treatment. Counsel confessed upon the hearing of the motion at the circuit that they were unable to assign any particular reason, supported by argument, for vacating the verdict and judgment. There was not, even, a satisfactory showing of good-faith purpose to settle a bill of exceptions and appeal to this court which was interrupted by the entry of judgment. The motion seems to have been based, wholly, on the theory that the filed request to vacate the verdict and

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grant a new trial worked a stay and so the rendition of judgment was irregular. If there were such irregularity it would not be good ground, in view of sec. 2829 of the Statutes, for vacating the judgment unless it was really prejudicial to the adverse party. It was not such in the absence of a satisfactory showing of good-faith purpose to appeal because of supposed prejudicial error, and none was suggested.

But the difficulty complained of was not even an irregularity. The motion for a new trial did not operate as a stay of proceedings. It was not "made in open court and entered in the clerk's minutes" (the journal of court proceedings as they occur) as provided in Circuit Court Rule XXXIII. The mere filing with the clerk of a motion and serving a copy thereof on the attorney for the adverse party is not a compliance with such rule. Moreover, it seems that the rule itself, in that it affords counsel for a losing party competency to stay proceedings without any action of the court, is in conflict with sec. 2861, Stats. (1898), which is mandatory to the effect that the clerk, in case of a verdict, shall enter judgment in the absence of some judicial direction to the contrary. The trial court so ruled and no reason is perceived why such ruling is not correct. The section does not apply, strictly speaking, in face of a verdict so finding the facts as to render an order for judgment necessary, but the spirit of it is that there shall be no delay after verdict, such as was sought in this case, except by order of court. The rule must give way to the statute.

Nothing particular need be said respecting the denial of the motion for an extension of time to settle a bill of exceptions. It was grounded on want of satisfactory explanation of the delay for several months and any showing of good-faith purpose to challenge the verdict for substantial error. In that situation it seems clear that the motion was properly denied. It is not perceived how any other course could well have been taken. Certainly such course did not involve an abuse of judicial discretion.

By the Court.—The order is affirmed.

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KERWIN and TIMLIN, JJ., are of opinion that no further showing of good faith, or "good-faith purpose to settle a bill of exceptions and appeal," was necessary; they think the good faith of counsel in such matters should be presumed and that there is nothing in this record to impeach that presumption. Aside from this they concur in the affirmance of the order.

NITKA, Respondent, vs. WESTERN UNION TELEGRAPH COMPANY, Appellant.

March 12—April 8, 1912.

Telegraph companies: Delay in delivery of message: Damages: Mental anguish: Evidence: Sufficiency: Constitutional law: Classification: Statutes: Validity.

1. In an action against a telegraph company to recover damages for mental anguish resulting from negligent failure to deliver a message in time to enable plaintiff to attend the funeral of his father, the plaintiff testified: "I felt awful sorry because I could not get over there." It also appeared that he had gone into the woods to work, and thereafter made two visits to his home to see his sick father. *Held* sufficient to sustain a recovery of $350.
2. An impromptu answer of the plaintiff to an oral interrogatory in an examination had prior to the trial, that he would not take $100 and miss his father's funeral, and other answers to the same effect, though admissible in evidence, were not conclusive upon him so as to preclude a recovery of more than $100.
3. A legislative classification by which special duties or special liabilities are imposed upon persons or corporations engaged in the business of receiving, transmitting, and delivering messages by telegraph, is justified by the substantial differences between that business and others, including the business of operating telephone lines.
4. A statute (sec. 1778, Stats.: Laws of 1907, ch. 165) providing that any person, association, or corporation operating or own-

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ing any telegraph lines doing business in this state shall be liable for damages for mental anguish resulting from failure or negligence in receiving, copying, transmitting, or delivering messages, is valid. It does not deprive any one of property without due process of law, or deny the equal protection of the laws, in violation of the XIVth amendment to the federal constitution or of the equivalent provisions in the state constitution.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *A. G. Zimmerman* and *Rufus B. Smith,* attorneys, and *Geo. H. Fearons,* of counsel, and oral argument by *Mr. Smith.*

For the respondent there was a brief by *Kittell & Burke,* and oral argument by *J. A. Kittell.*

TIMLIN, J. In this action for negligent failure to deliver a telegraph message in time to enable the plaintiff to attend the funeral of his father the plaintiff recovered damages under ch. 165, Laws of 1907 (sec. 1778, Stats.), which provides that any person, association, or corporation operating or owning any telegraph line doing business in the state of Wisconsin shall be liable for damages for mental anguish resulting directly and proximately from or occasioned by the failure or negligence of their operators, servants, or employees in receiving, copying, transmitting, or delivering dispatches or messages, not to exceed in amount the sum of $500. The verdict was for $350.

1. The defendant contends that there was no sufficient evidence of mental anguish to justify a recovery in that amount. The plaintiff is a laborer and was engaged in working in the lumber woods, and on this point merely testified: "I felt awful sorry because I could not get over there." But it also appeared that he went to work in the woods about two weeks before Christmas, that he went home Christmas time and again thereafter and before the death of his father, to see the latter, who was sick. The point is made that there should

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have been some further facts or circumstances put in evidence tending to show mental anguish or that the plaintiff should have given some description of the poignancy of his feelings so that the jury might have some basis upon which to estimate the degree of his mental anguish. This mental condition would be quite difficult for an ordinary laboring man to describe. The intensity of mental anguish is not always proportionate to the eloquence or power of description of the sufferer. There is no known ratio of anguish to outcry. It is impossible to measure mental anguish accurately in money, and the jury could as well fix the damages from the simple statement of this laborer as they could from a more eloquent and theatrical display of grief by a more accomplished witness.

A number of like cases are collected in respondent's brief affirming upon similar evidence verdicts for damages as follows: *Western Union T. Co. v. Adams,* 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, $2,000; *Western Union T. Co. v. Gillis,* 97 Ark. 226, 133 S. W. 833, $300; *Western Union T. Co. v. Webb* (Ark.) 135 S. W. 366, $625; *Western Union T. Co. v. Dodson* (Miss.) 54 South. 844, $1,000; *Maley v. Western Union T. Co.* 151 Iowa, 228, 130 N. W. 1086, $300; *Western Union T. Co. v. Gilstrap,* 77 Kan. 191, 94 Pac. 122, $750; *Western Union T. Co. v. Bell,* 48 Tex. Civ. App. 151, 106 S. W. 1147, $400; *Western Union T. Co. v. Caldwell,* 126 Ky. 42, 102 S. W. 840, $1,000; *Potter v. Western Union T. Co.* 138 Iowa, 406, 116 N. W. 130, $1,000.

It is next contended that in oral cross-examination for the purpose of discovery, had prior to the trial, the plaintiff testified that he would rather give $100 than miss going to his father's funeral and that he would not take $100 and miss his father's funeral; and the case of *Berger v. Abel & B. Co.* 141 Wis. 321, 124 N. W. 410, is cited to uphold the argument that in consequence of this testimony the plaintiff's damages should have been limited to $100. It will be observed that

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the plaintiff in this case did not testify that his damages were $100, that the answers above referred to were given impromptu to oral interrogatories, and that in the case relied upon the admission was specific, deliberate, in writing, and in a measure the foundation of the plaintiff's claim. The testimony given by plaintiff in the instant case was proper to be submitted to and considered by the jury, but not conclusive upon him.

2. It is next contended that the statute authorizing a recovery for mental anguish against telegraph companies is invalid in that it deprives the defendant of property without due process of law and denies to it the equal protection of the laws, contrary to the XIVth amendment to the federal constitution and contrary to the equivalent provisions in the constitution of this state. A recovery for mental anguish, more commonly referred to as mental suffering, is no novelty in the law. It has been approved in actions for breach of promise of marriage attended with certain aggravating circumstances, *Giese v. Schultz,* 65 Wis. 487, 27 N. W. 353; in actions for negligence, *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Reinke v. Bentley,* 90 Wis. 457, 63 N. W. 1055; *Fenelon v. Butts,* 53 Wis. 344, 10 N. W. 501; in actions of assault and battery, *Barnes v. Martin,* 15 Wis. 240; *Wilson v. Young,* 31 Wis. 574; in actions for false imprisonment, *Sorenson v. Dundas,* 50 Wis. 335, 7 N. W. 259; in actions for libel and slander, *Wilson v. Noonan,* 35 Wis. 321; *Buckstaff v. Hicks,* 94 Wis. 34, 68 N. W. 403; in actions for a wrongful mutilation of a dead body of a relative, *Koerber v. Patek,* 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 956; in a statutory action by a wife against a saloon-keeper for causing the intoxication of her husband, *Peterson v. Knoble,* 35 Wis. 80.

The effect of the statute in question, therefore, is to extend this measure of damages to the negligent acts of telegraph companies mentioned in the statute. The statute in question does not attempt to classify persons except with reference to

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their business or occupation. It imposes this liability "upon any person, association or corporation operating" any telegraph line doing business in this state. Examining the question *a priori,* we must start with the axiom that the legislature has all legislative power not withheld or limited by the constitution of the state or the exercise of which is not prohibited by the federal constitution. Legislative power necessarily includes classification with reference to the acts forbidden or authorized by the statute or with reference to the persons forbidden or authorized, or with reference to both. Hence all legislation involves classification. Where the legislative command includes only a kind of persons and imposes upon such persons duties and burdens not common to others, there must exist in the relations of such persons to the state, to the public, or to individuals some reasonable ground of distinction sufficient to show the classification is not merely personal and arbitrary or else there will be a denial of the equal protection of the law. This same invalid result could be reached by a statute which included only certain occupations, but in that case the unconstitutionality would not be so direct and obvious and could be asserted of the statute where the description of the occupation was equivalent to a designation of persons; or where there were no distinctive features in the occupation to furnish a legitimate basis for classification. The courts are not, in either case, to review the legislative discretion where such discretion is found to exist, nor to require the legislature to specify its reasons for the classification. Because no act of the legislature is to be declared invalid unless its invalidity appears clearly and beyond reasonable doubt, we are to presume that the legislature acted upon legitimate grounds of distinction, if any such grounds exist. The business of receiving, transmitting, and delivering messages by telegraph is not like anything else. The telegraph company undertakes to transmit messages with greater speed over long distances, thus distinguishing it from the mail and from pri-

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vate messenger service. It undertakes the public duty of doing this for those for whom the former is too slow and to perform this service in all such matters requiring haste. It receives the message to be delivered, controls its contents by rewriting, controls the office of reception and delivery, and it alone knows or has opportunity to know, within the requisite time, of errors in transmission or delays in delivery; thus distinguishing it from the telephone business, which furnishes the instruments by which the patron sends his own message, shaped by himself and delivered by himself, and in which the patron knows at once whether he has been able to communicate with the person addressed or not. These substantial differences the legislature had the right to recognize and act upon. The legislature may also have considered that the telegraph is the commonly accepted vehicle for the transmission and delivery of messages relating to the affections when such messages are urgent and cannot await the slower process of the mails or abide the publicity and delays of the telephone in securing the attendance of the addressee at the delivery station. We do not have to say with certainty that the legislature considered either of these. It is sufficient that it might have done so, or, in other words, that there exist differences in the business having reasonable relation to the object of the statute in question.

3. If we consider the question upon authority the result is the same. A statute imposing upon telegraph companies a liability for mental anguish or suffering in case of their negligent failure in the transmission or delivery of messages is valid. *Ivy v. Western Union T. Co.* 165 Fed. 371, and cases cited. To the same effect and to the point that there is a substantial ground for classification between telegraph and telephone companies, see *Simmons v. Western Union T. Co.* 63 S. C. 425, 41 S. E. 521. A classification for the imposition of special duties or special liabilities arising out of the peculiar business in which persons in that class are engaged is a

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just classification, and it is no objection that the duty is enforced by an award of damages to the party injured by breach of such duty. *Mo. Pac. R. Co. v. Humes,* 115 U. S. 512, 6 Sup. Ct. 110; *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U. S. 150, 17 Sup. Ct. 255; *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756; *Western Union T. Co. v. Ferguson,* 157 Ind. 37, 59 N. E. 416.

By the Court.—Judgment affirmed.

SIGL, Respondent, vs. GREEN BAY TRACTION COMPANY, Appellant.

March 12—April 3, 1912.

Street railways: Injury to person attempting to board moving car: Negligence: Questions for jury.

It was, in this case, negligence as a matter of law for plaintiff to attempt to board the front vestibule of a moving street car after it had stopped at a usual stopping place and had started again and was being speeded up, it appearing, among other things, that the vestibule door was closed and locked and that it was evident to the plaintiff that the motorman either did not see his signals or did not intend to pay any attention to them.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

Plaintiff brought this action to recover damages for injuries sustained while attempting to board one of defendant's interurban cars in the city of Green Bay. The complaint alleged that the car in question was proceeding in a northerly direction on Webster avenue, after having stopped at the corner of Porlier street and Webster avenue; that plaintiff approached the car from the south and at the same time signaled to the motorman to indicate that he desired to get on; that

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the car proceeded very slowly up to the point where plaintiff met it, and, as he was about to board the front end, started with a jerk, materially increasing its speed, and plaintiff was thrown to the ground and rolled against the trucks of the car. The answer put in issue the material allegations of the complaint. By its answers to questions submitted on a special verdict the jury found that plaintiff was injured by falling from one of defendant's cars while attempting to get on; that his fall was caused by the car being jerked forward by a sudden increase of speed after plaintiff had gotten hold of the hand-rails and had his foot on the lower step; that the motorman was negligent in so increasing the speed of the car; that a man of ordinary intelligence and prudence in the motorman's position should reasonably have foreseen that suddenly increasing the speed of the car would cause some injury to the plaintiff; that no want of ordinary care on the part of the plaintiff contributed proximately to his injury; and that plaintiff was damaged in the sum of $569. On such verdict judgment was entered. Defendant appeals.

For the appellant there was a brief by *Greene, Fairchild, North & Parker,* and oral argument by *B. L. Parker.*

For the respondent there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.* They contended, *inter alia,* that the true rule concerning contributory negligence in boarding or alighting from moving street cars is that the matter is entirely a question for the jury except when the admitted facts require a court to say that it was reckless in the person to attempt to get upon the car. *Fosnes v. Duluth St. R. Co.* 140 Wis. 455, 122 N. W. 1054; *Hemmingway v. C., M. & St. P. R. Co.* 72 Wis. 42, 50, 37 N. W. 804; *Citizens' St. R. Co. v. Spahr,* 7 Ind. App. 23, 33 N. E. 446; *Eppendorf v. Brooklyn City & N. R. Co.* 69 N. Y. 195, 197; *Sahlgaard v. St. Paul City R. Co.* 48 Minn. 232, 51 N. W. 111; 3 Thompson, Neg. 886, 887, § 3511; 6 Cyc. 644.

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BARNES, J. The following facts are undisputed: The car was in motion when plaintiff attempted to board it. It had stopped at a usual stopping place and had just started. The signals which the plaintiff made to the motorman were made before the car started. It was evident to the plaintiff that the motorman either did not see the signals or that he did not intend to pay any attention to them. The attempt to board the car was made when it was being speeded up. The front vestibule door of the car was closed, so that plaintiff was notified to stay out rather than invited to come in. It was not only closed, but was locked by means of the trap door being down, although the plaintiff did not know this fact. Still, he had as much right to assume that it was locked as he did to assume that it was unlocked. The bottom of the door came close to the top of the platform. When the door was closed it was nearly if not quite flush with the step leading to the platform. Or, stated in another way, the outer edge of the step was almost on a line drawn perpendicularly from the door to the step. There was a foothold on the step, but plaintiff could retain his position thereon only by hanging to the hand-holds, and he could not open the door if it were unlocked except by using one of his hands. Under these facts, we conclude that plaintiff was guilty of contributory negligence as a matter of law. *Champane v. La Crosse City R. Co.* 121 Wis. 554, 99 N. W. 334; *Fosnes v. Duluth St. R. Co.* 140 Wis. 455, 122 N. W. 1054; *Paulson v. Brooklyn City R. Co.* 13 Misc. 387, 34 N. Y. Supp. 244; *Phillips v. R. & S. R. Co.* 49 N. Y. 177.

Having reached this conclusion, it is unnecessary to consider any other errors that are assigned. There was no evidence of gross negligence to go to the jury. The evidence of ordinary negligence was, to say the least, slight. It may be that the accident would have happened if the vestibule door had been open, but it would not have happened if the plaintiff had not negligently attempted to board the car. It follows

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that the court should have directed a verdict for the defendant.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

FRANCOIS, Appellant, vs. CADY LAND COMPANY, Respondent.

March 12—April 3, 1912.

Deceit: When actionable: Opinions as to value of property: Statute of frauds: Oral contract of guaranty: Pleading: Amendment: Changing action from contract to tort.

1. A false representation must be relied and acted upon in order to be actionable.
2. Statements as to the value of property about to be sold, where inspection is open to the buyer, are ordinarily regarded as mere expressions of opinion, and will not be regarded as statements of fact on which actionable fraud can be based, in the absence of extrinsic circumstances, like fiduciary relations or artifice, by which the buyer is prevented from making investigation himself.
3. A contract by which the vendor of a note and mortgage executed by a third person guarantees payment thereof is a contract to answer for the debt, default, or miscarriage of another, and is void, under sec. 2307, Stats. (1898), if not in writing.
4. An amendment which does not state facts showing an actionable tort does not change a complaint from one on contract to one in tort.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

The defendant is a corporation dealing in real estate and real-estate securities at Green Bay. On October 8, 1907, the plaintiff purchased from the defendant at par the note of one John Mosuch and wife for $2,300, due three years after its date (viz. September 14, 1907), secured by a mortgage upon a lot and building thereon in the city of Oshkosh, which the

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plaintiff had never seen. The plaintiff had previously purchased of the defendant several securities of the same kind, and he alleged in his complaint

"That said *Joseph P. Francois* had for some time purchased from the *Cady Land Company* other notes held and owned by it. That it was the understanding and agreement by and between said *Cady Land Company* and said *Joseph P. Francois,* that said *Cady Land Company* should stand back of, make good, and guarantee collection and payment of all notes, mortgages, or other evidences of indebtedness which said plaintiff should at any time purchase for it. And it was understood and agreed by plaintiff and defendant that said *Cady Land Company* would stand back of, make good, and guarantee the payment and collection of such note of John and Elizabeth Mosuch. And that if said makers did not pay the same according to the tenor of the note and mortgage hereinafter referred to, then said *Cady Land Company* would itself pay the same.

"That said plaintiff is a man unskilled in business ways and especially as to legal matters, and relied in the transaction herein set out upon said defendant, and had no attorney or other legal advice, but depended upon said defendant and its promises aforesaid."

The complaint further alleged that the real estate described in the mortgage was not worth the face of the mortgage, and that the defendant knew the fact at the time of the sale, that the interest due September 14, 1908, was unpaid, that the makers of the note are insolvent, that the mortgage was duly foreclosed and the property sold, from which sale the plaintiff received to apply on his debt $1,627.10, leaving a balance unpaid of $1,097.16, for which judgment was demanded against the defendant.

The action was tried before a jury, and the following special verdict was rendered:

"(1) Did the defendant at the time it sold the note and mortgage in question to the plaintiff agree with him, as part of the contract of said sale, that it would stand back of and make good the same? *A.* No.

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"(2) Did the defendant represent to said plaintiff, while negotiating said sale, that the mortgaged property was worth $4,500? *A.* Yes.

"(3) If your answer to the second question should be 'Yes,' then answer this: Did the plaintiff buy said note and mortgage relying upon said representation? *A.* Yes.

"(4) What was the fair market value of said mortgaged property at the time of said sale? *A.* $2,700."

The court made an additional finding of fact to the effect that "all representations made by said defendant or its agents as to the value of the mortgaged property were made honestly and in good faith, and without intent on the part of the defendant or its officers to induce the plaintiff to forego independent investigation as to the true value of said land." Thereupon the court dismissed the complaint, and the plaintiff appeals.

Sol. P. Huntington, for the appellant.

For the respondent there was a brief by *Cady, Strehlow & Jaseph,* and oral argument by *Samuel H. Cady.*

WINSLOW, C. J. The action was brought upon a supposed contract of guaranty. This is apparent from the complaint. Upon the trial the plaintiff's evidence showed that the defendant's agent, at the time plaintiff purchased the mortgage, represented that the mortgaged property was worth somewhere from $4,500 to $5,000, and that he relied upon the representation. The defendant's agent admitted that he stated that in his opinion it was worth $4,500. At the close of the evidence in the case and on June 16, 1911, the plaintiff was allowed to amend his complaint by adding after the allegation that the mortgaged real estate was not worth the face of the mortgage and that the defendant knew that fact, the following words: "but represented to the plaintiff that said property was worth $4,500, but as matter of fact it was not worth more than $2,000." The reason for the making of this amendment is not obvious. If the idea was to state a cause of action in tort

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for damages caused by false and fraudulent representations it was entirely insufficient, because it did not allege that the plaintiff relied upon the alleged representation in making the purchase. A false representation must be relied and acted upon in order to be actionable. *Puffer v. Welch,* 144 Wis. 506, 129 N. W. 525. So the amendment did not change the complaint from contract to tort, even conceding that such a change could have been properly made under the provisions of ch. 353 of the Laws of 1911 (sec. 2669*a*, Stats.), allowing the making of amendments changing a cause of action from contract to tort, which act took effect June 17, 1911.

If it be argued that the form of the pleading should be disregarded, that the evidence of fraud came in without objection, and that, the verdict having determined the fact of reliance, there should be judgment for the plaintiff thereon, the answer is that there is no finding that the representation of the value of the mortgaged property was a representation of fact. It is very well known that statements of the value of property about to be sold, where inspection is open to the buyer, are ordinarily regarded as merely expressions of opinion, and will not be regarded as statements of fact on which actionable fraud can be based, in the absence of extrinsic circumstances, like fiduciary relations or artifice, by which the vendee is prevented from making investigation himself. *Horton v. Lee,* 106 Wis. 439, 82 N. W. 360. There was no finding of any such extrinsic circumstances here, and no request by the plaintiff to submit any questions covering such matters. It must be considered, therefore (conceding that the questions were material), that they were determined by the circuit judge in conformity with the judgment. Sec. 2858*m*, Stats. (Laws of 1907, ch. 346). Indeed, the finding actually made by the court seems in effect to cover the question and make the expression relied upon simply an opinion. These considerations dispose of the tort features of the case, if any there be.

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As to the contract feature little need be said. It is clear that if there was any contract at any time it was a contract to answer for the debt, default, or miscarriage of another, and such contracts are void if not in writing. Sec. 2307, Stats. (1898). The reasons why there can be no recovery on contract seem to be so numerous as to be almost embarrassing: (1) The jury found as a fact that none was made at the time of the sale; (2) if any promise was made before the sale, the evidence shows that it was nothing more than a naked promise without consideration of any kind; (3) whether made before or at the time of the sale, it was void because not in writing.

By the Court.—Judgment affirmed.

WALSH, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

March 12—April 3, 1912.

Railroads: Injury to person pushed from train: Evidence.

A finding by the jury that plaintiff, who had boarded a train at the rear end of the tender, was pushed therefrom by the baggageman, is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

Action for personal injury.

Plaintiff, a brakeman in the employ of defendant, was injured, October 17, 1910, by having his leg run over by one of its trains. The circumstances, as related by him, are these: He went to the depot at Oshkosh to take the train for his home in De Pere. The train not being due for some little time, as he supposed, he went a short distance from the station to obtain some tobacco. The place he went to was on

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the opposite side of the track from the depot and the side where passengers were required to board trains. Having procured the tobacco and observed that his train had arrived and was starting out, he hurried to reach the track by way of the street and did so just as the engine had crossed it. The cars in the train were of the vestibuled character with all of the entrances closed on the side he approached. There was no way, as he supposed, to board the train except by getting on behind the tender and passing through the baggage car. Being an experienced railroad man and used to boarding and jumping off trains while they were in motion at a moderate rate of speed, without hesitation he secured a place at the rear corner of the tender by stepping both feet into the stirrup there located and taking hold of the handle bar. He purposed then making the front platform of the baggage car, attracting the attention of the baggageman and securing permission from him to pass through to the passenger car. He anticipated no difficulty in that regard because he was acquainted with the baggageman and had been for some time. He had money to pay his fare and intended to do so and ride as a passenger. As he was about to step on the platform the baggageman appeared and ordered him off. He tried to explain who he was and why he had thus boarded the train but the baggageman did not recognize him and persisted in his alighting from the train. He hesitated to do so, whereupon the baggageman violently pushed him off, causing him to fall with his right leg across the rail so the car wheels passed over and severed it.

The trainmen told a different story than plaintiff. The baggageman denied pushing plaintiff off, but admitted he was hanging to the corner of the tender and pushing his hat off to coerce him into alighting. There was other evidence from trainmen tending to show that when plaintiff reached the ground from the tender he picked his hat up and made further attempts to board the train so as to steal a ride. He talked with several persons immediately after he was injured as to

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how the accident occurred, not claiming, as such persons testified, that he was pushed off by the baggageman. To such persons he said, as they claimed, that he tried to board the train and slipped so that he was caught by the car wheel; that he caught on to the train but could not get into the car because of the vestibule door being closed. There was other evidence that he stated the circumstances of the injury substantially according to his testimony on the trial.

The jury found in plaintiff's favor upon the ground that the baggageman pushed him violently off the train as he claimed.

Defendant made the necessary motions and took the appropriate exceptions to save for review the question of whether the verdict was warranted by the evidence and that of whether the trial court denied relief from the verdict through mistake of law. Counsel for defendant argued below, on the motion to set aside the verdict as unwarranted by the evidence, that such evidence showed physical impossibility of one circumstanced as the baggageman was to reach another situated as plaintiff claimed he was and push him off. The court answered, "the jury might well have believed the testimony of the plaintiff that he was pushed, and believe that if it were necessary to reconcile that fact with the distance shown, that he was mistaken as to the exact distance between the two parties." The court carefully reviewed the case and stated its conclusion thus: "The evidence presented a fair question for the jury."

For the appellant there was a brief by *William G. Wheeler*, attorney, and *Edward M. Smart*, of counsel, and oral argument by *R. Jackman*.

For the respondent there was a brief by *Martin, Martin & Martin*, and oral argument by *P. H. Martin*.

MARSHALL, J. The only question submitted which calls for mention is whether the evidence had such probative char-

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acter, in any view which the jury could reasonably have taken of it, as to warrant a finding that plaintiff was pushed off the train as he claimed. The learned circuit judge who tried the case answered that very emphatically in the affirmative. He had better opportunity for discovering the truth than is afforded here. We cannot say he was clearly wrong. Therefore the judgment must be affirmed.

By the Court.—So ordered.

RUSSELL, Appellant, vs. FISH and others, Respondents.

March 12—April 3, 1912.

Equity: Action to establish title to land: Delay as a bar: Laches.

An action to have it adjudged that plaintiff had an undivided interest in land, the title to which had been taken in defendant's name, was properly held to be barred by plaintiff's laches, it appearing, among other things, that his right to such an interest rested mainly in parol and that the burden was upon him to establish it by clear, convincing, and undoubted proof; that, though fully informed that his claim was disputed, he delayed prosecuting the same for nearly ten years; that such delay was unexplained except by a suggestion that he had been advised by counsel not to proceed until it was known whether or not defendant had realized any profit from the transaction, the property being highly speculative in character; and that in the meantime most of the persons who were concerned in the transaction had died, and the property had been transferred to others who were not clearly chargeable with knowledge sufficient to put them upon inquiry as to any claim such as the plaintiff's.

APPEAL from a judgment of the circuit court for Ashland county: E. C. HIGBEE, Judge. *Affirmed.*

In 1898 one Byron A. Simmons of Hartford, Connecticut, was the owner of 1,180 acres of hemlock timber land on Made-

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line Island, Ashland county. At this time the plaintiff was engaged in lumbering on Madeline Island. He knew the character of the land owned by Simmons, had examined the timber and cruised it, and had had some negotiations with Simmons regarding the purchase of these lands. He did not have the money with which to make the purchase, and in the fall of 1898, with the idea of getting assistance to secure the lands, he called the attention of one Peter Fish, who had previously acted as his agent in lumbering operations, to the lands and their condition.

Negotiations were opened by the plaintiff and Fish with a Mr. Sanborn of Ashland, Wisconsin, which resulted in an agreement that Sanborn would furnish the funds necessary to make the purchase ($2,250), should take the deed in his name as trustee, should retain a one-third interest for one third of the purchase price, and should hold the title as security for the payment of the other two thirds of the purchase price by the plaintiff and Fish, who were each to obtain a one-third interest thereby. About the time of the commencement of the negotiations Fish paid to one W. B. Rea of Ashland, the agent for Simmons for the sale of the lands, $100 as earnest money on the purchase price.

While these negotiations were being carried on, some person, claiming to be the agent of Simmons, contracted to sell the lands to one D. W. Mowatt, and before the sale to Sanborn could be concluded Mowatt commenced an action for specific performance against Simmons. This action was finally settled, Mowatt receiving $500 in settlement of his claim, and it was understood that the amount to be paid for a deed to Simmons was to be increased by this amount.

While the negotiations were under way between the plaintiff, Sanborn, and Fish, and while the Mowatt suit was being settled, Peter Fish brought the proposition for the purchase of the lands to the attention of his brother, John Fish, a resident of Menominee, Michigan, purposing to have John Fish

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furnish the money for the purchase upon the same terms as had been agreed upon between the plaintiff, Sanborn, and Peter Fish, the cost with expenses being about $3,000, John Fish to take the title as trustee for the others and to secure the payment of the money ($2,000) he would thus advance for the plaintiff and Peter Fish. Shortly after the proposal was presented to him, John Fish, in company with the plaintiff and Peter Fish, inspected the timber and negotiated for the purchase, the plaintiff and Peter Fish insisting upon terms such as they had had with Sanborn. The trial court found that these terms were finally arranged between Peter and John Fish and that they were assented to by John Fish. The understanding between the parties was never reduced to writing, it was entirely oral, and neither the plaintiff nor John Fish ever subscribed any agreement or writing.

There was evidence before the court that John Fish was unwilling to go into the deal on the terms proposed; that he did not wish to enter into a partnership relation with the plaintiff; that the negotiations regarding the purchase were practically all made by John Fish with or through his brother, Peter Fish; that John Fish insisted upon making an out-and-out purchase of the property for himself; that Peter Fish and one Bates, a banker who held the title only to transfer it for Simmons, inserted the word "trustee" after John Fish's name in the deed by which the lands were conveyed to him, with the idea that John Fish would afterwards assent that Peter Fish and the plaintiff should have an interest in the land; and that John Fish, on learning that the word "trustee" had been inserted in the deed after his name, complained and objected and insisted that he had made the purchase for himself alone. The deed was prepared and executed by Bates, to whom John Fish had sent a draft for the purchase price.

It is not clear from the evidence that Peter Fish had informed the plaintiff, before the conveyance to John Fish, that John Fish had refused to make an arrangement such as had

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existed between the plaintiff, Peter Fish, and Sanborn. The plaintiff learned, however, that John Fish claimed full ownership of the property prior to July 13, 1900, when he tendered John Fish one third of the amount paid for the lands with interest thereon from the time Fish furnished the money to make the purchase, and demanded a deed of a one-third interest in the lands. Fish at that time denied that the plaintiff had any interest in the lands, and the plaintiff then brought action to enforce the alleged trust and to compel a conveyance. On October 31, 1903, this action was dismissed by the plaintiff and judgment for costs entered against him. There was evidence by the plaintiff that his counsel advised him not to commence an action until it was known what damages he had sustained by a sale of the timber by John Fish, and there was evidence by his counsel that plaintiff had been advised to that effect.

Nothing further was done regarding the lands or the timber until May 1, 1906, when John Fish sold the timber standing on the lands to the defendant *Wachsmuth Lumber Company* of Bayfield, Wisconsin, for $30,000. The purchaser commenced removing the timber in the fall of 1906 and had completed the work in the spring of 1909. Plaintiff was aware of the negotiations for the sale, of their consummation, and of the removal of the timber, but took no steps to protect his alleged interest or to assert his rights.

The present action was commenced on March 17, 1909, but because of the death of the defendant John Fish on March 19, 1909, the action was not begun as to the widow and children until January 17, 1910.

Peter Fish died in January, 1903; Mr. Tomkins, an attorney who took part in the drawing of the deed conveying the lands to Fish, in the spring of 1908; John Fish March 19, 1909; Richard B. Bates, the banker who acted for Simmons and through whom the title passed from Simmons to Fish, in May, 1910; and Simmons in July, 1910.

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The trial court held that the plaintiff could not maintain this action because the alleged agreement for the purchase of an interest by the plaintiff was not evidenced as required by the statute of frauds and because of the laches of the plaintiff. This is an appeal from the judgment in accord with the above holding.

For the appellant there were briefs by *Sanborn, Lamoreux & Pray,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

William F. Shea, for the respondents.

SIEBECKER, J. The appellant contends that the trial court erred in dismissing plaintiff's complaint upon the ground that the plaintiff was guilty of laches in enforcing his alleged right and hence in equity was barred a recovery. No arbitrary rule exists by which stale demands may be ascertained and characterized so as to defeat an alleged claim or right; each case must rest largely upon its own facts and circumstances. Delay in asserting a right is by common consent a circumstance tending to show its want of justness, and when unreasonably extended, though unattended by other inequitable features, may create a conclusive presumption against the validity of a claim, if the delay is continued under circumstances affording opportunity for diligence. There are many phases of conduct in connection with long delays in enforcing rights which a court of equity will consider to determine whether or not a case of laches exists. Of these may be mentioned the loss of evidence occasioned by the death or departure of witnesses; the diminished probative force of evidence resulting from such delay; the change of relations to the property concerned in the litigation, by which rights of other parties may have become involved and might be adversely affected by enforcement of the claim; and the changes in the conditions of the property, such as a marked appreciation or depreciation in its value, when the right might have been enforced

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before such change and without awaiting the outcome thereof before asserting or renouncing the right in accordance with the result. These considerations find universal recognition in the adjudications on the subject. *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532; *Rogers v. Van Nortwick,* 87 Wis. 414, 58 N. W. 757; *Likens v. Likens,* 136 Wis. 321, 117 N. W. 799. In the light of the well established principles, adhered to in these and other adjudications of this court, governing the question of laches, we are persuaded under the facts and circumstances of this case that the plaintiff has not shown himself properly diligent in enforcing the right upon which he now seeks a recovery against the defendants. His right to any interest in the property rested mainly in parol, and the alleged circumstances of its acquirement cast upon him the burden of establishing it by clear, convincing, and undoubted proof. This condition of his claim had peculiar force in calling on him to act promptly when he found his claim to an interest in the property was denied by John Fish, in order that he might present his claim while the circumstances of the transaction were fresh in the minds of men competent to testify thereto, and that he might thus avoid loss of such evidence through death or the destruction of its force by long lapse of time. The fact is, however, that the plaintiff, though fully informed that his claim or right was disputed, delayed prosecution for its enforcement for nearly ten years, during which time there were no obstacles to prevent him from prosecuting his claim. Nor is any reasonable explanation offered for such delay. The suggestion that he was advised by counsel not to proceed against the defendant to assert his right by legal action until it was known whether or not Fish had realized any profits from the transaction affords no excuse and tends to emphasize his inexcusable delay. It is universally recognized that the speculative character of the property involved in a transaction is an important element in determining the effect of delay in claiming a right thereto and that a higher

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degree of diligence is required to avoid the charge of laches in such cases. The facts of this case are clear that the property was highly speculative in character, that this was well known to the plaintiff, and that he delayed enforcement of his alleged right for many years to await the outcome of the investment and enterprise. This is a strong feature of the case tending to show that the plaintiff was called upon to act expeditiously in enforcing any right to an interest in this property. Then again, it appears that the plaintiff's long delay has operated prejudicially to the defendants, in that John Fish and Peter Fish, as well as Mr. Simmons, the grantor of the land, his attorney, and the banker who represented him in the transfer, are all deceased. This seriously affects the inquiry into the justice of the cause. It also appears that the property has been transferred to third parties, who have been made defendants to the suit. Nor is it clear that the recorded conveyance and the external facts and circumstances of the transaction gave such implied or express knowledge to the purchaser as was sufficient to put it upon inquiry respecting such a claim. In the light of these facts and circumstances, plaintiff's want of diligence in enforcing his alleged right is clearly shown and the court properly held him to be barred by his laches from now enforcing such a right, and properly awarded judgment dismissing the complaint.

This result renders it unnecessary to consider any of the other questions presented in the briefs of counsel.

By the Court.—Judgment affirmed.

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COATS, Respondent, vs. CAMDEN FIRE INSURANCE ASSOCIATION, Appellant.

March 13—April 3, 1912.

Fire insurance: Mistake in describing property: Correction in action at law: Evidence: Estoppel: Application showing title: Falsity: Failure to attach application to policy.

1. **Although, as a result of a mutual mistake, a fire insurance policy does not correctly describe the land upon which insured buildings were located, such misdescription does not render the policy a nullity or prevent a recovery in case of loss, where the buildings destroyed were those intended by both parties to be insured, and the actual place where they were located and their environment were fully known to both.**
2. **Where such mistake is disclosed upon the trial of an action at law upon the policy, it may be corrected in such action without resorting to an independent action in equity to reform the policy.**
3. **The exclusion of evidence on the part of defendant in such a case to show an alleged misdescription of the premises is, therefore, not ground for reversal on appeal.**
4. **Where the application for insurance states that the assured holds the buildings insured under a contract for a deed, the company is estopped, in an action on the policy, from asserting its invalidity on the ground that the insured had not a fee title or the sole and unconditional ownership, as stipulated therein.**
5. **Failure of an insurance company to attach to its policy a copy of the written application, as required by sec. 1945*a*, Stats. (1898), estops it from defeating, on the ground that the title was misrepresented in such application, the right of the insured to indemnity under the policy for loss sustained to his insurable interest in the property. BARNES, J., WINSLOW, C. J., and MARSHALL, J., dissent.**

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This action is brought to recover the amount of a loss sustained by the plaintiff through the destruction by fire of the

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property insured by the defendant under its standard form of policy, which was issued and delivered to the plaintiff.

The policy describes the property covered and insured as located and situated on the northeast quarter of the northeast quarter of section 28, township 47, range 8 west, Bayfield county, Wisconsin. In the application blank, filled out by the plaintiff but not attached to the policy, the property is described the same as in the policy. It also states that the plaintiff's title to the land was under a "contract for a deed," and that the premises were incumbered to the amount of $800.

Shortly before the policy was issued the plaintiff purchased from one Devine certain buildings and other personal property. Devine was in possession of the property and was holding the premises upon which the buildings stood under a verbal understanding with one Ernest Sauve, who represented the Hines Lumber Company, owner of the land, that he would get the title for Devine. Immediately upon making the purchase from Devine the plaintiff went into possession of the premises and held them under the same arrangement with Sauve. Sauve and certain other persons who were interested in obtaining the title for the plaintiff had acted and were expecting to act as agents for the owner of the lands upon which the buildings were situated. Two of the buildings with their contents, which the plaintiff had purchased from Devine, were destroyed by fire.

The facts as above stated with regard to the title were brought out during plaintiff's presentation of her case. Under the court's interpretation of sec. 1945*a*, Stats. (1898), as amended by sec. 1, ch. 51, Laws of 1905, the defendant was not permitted to produce evidence to show that the property destroyed was not the property described in the policy. The evidence offered by the defendant on this point tended to show in effect that the parties made a mistake in the location of the section line between sections 21 and 28 and that the section line was about 600 feet farther south than they located it.

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Nor was the defendant permitted to produce evidence to show that the plaintiff's title was not in accord with the title as stated in the policy and was not in accord with the statement respecting it in the application for the insurance.

At the conclusion of the evidence, upon motion the court ordered judgment for the plaintiff. This is an appeal from the judgment so ordered.

For the appellant the cause was submitted on the brief of *W. S. Cate* and *M. H. Boutelle & N. H. Chase,* and for the respondent on that of *Sanborn, Lamoreux & Pray.*

SIEBECKER, J. The first contention is that the court erred in excluding the evidence of the defendant tending to show that the property destroyed is not the property described in the policy constituting the insurance contract between the parties. The record shows that the buildings actually destroyed were those the plaintiff and the insurance agent who solicited the insurance intended to include in the contract, and that the plaintiff's claim for loss is for their destruction by fire. The plaintiff offered evidence tending to show that they were located on a certain quarter-section of section 28 of the specified township, which is identical with the description of the property in the policy. The defendant offered proof to contradict this, and offered evidence tending to show that the section line was 600 feet to the south of the buildings described in the contract. The lands were uninclosed wild lands, and it is manifest that the plaintiff and the insurance agent were not informed as to whether or not the buildings were to the north or south of the section line dividing sections 21 and 28 in the specified township. If the defendant's evidence be assumed to be correct, the actual location of the buildings, according to the government location of this section line, was at a distance of about 600 feet from where they were located under the plaintiff's evidence, and they were in an adjoining section of this township. The plaintiff and the agent were not mis-

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led by this mistake as to the actual place where they stood or as to their actual environment and relation to other properties. It is apparent that the mistake in describing the land in no way affected the identity of the structures insured and in no respect the risk and hazard assumed by the insurer. The record is clear that the misdescription was purely a mistake of the plaintiff and the defendant's agent in not knowing the location of the section line between sections 21 and 28. We consider that the alleged error did not render the policy a nullity, since it is shown that the buildings intended to be designated in the policy were the property of the plaintiff and were in fact the property which the plaintiff and the defendant's agent actually identified as that included in the alleged mistaken description. Under the circumstances the error in no way adversely affected the parties to the policy, and if actually existing it should be corrected in this action.

We find no obstacle to its correction in this action on the policy, if it be material, without resorting to an independent action in equity to reform the policy as for a mistake so as to express the correct description of the real estate. Such a course deprives neither party of any substantial right and it promotes the ends of justice. It avoids circuity of actions and the unnecessary delays consequent upon seeking reformation in a separate action. The practice of thus correcting this mistake in this action is in harmony with the spirit of our Code, which seeks to have equitable relief awarded in all actions, whenever the circumstances of the transaction under investigation call for its application. Secs. 2600 and 2647, Stats. (1898). This course of procedure on this question has been upheld by the courts in the following adjudications: *State Ins. Co. v. Schreck,* 27 Neb. 527, 43 N. W. 340; *Manhattan Ins. Co. v. Webster,* 59 Pa. St. 227; *Am. Cent. Ins. Co. v. McLanathan,* 11 Kan. 533. The following support the principle of granting such relief in the legal action on the policy: *Smith v. Commonwealth Ins. Co.* 49 Wis. 322, 5 N.

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W. 804; 1 Cooley's Briefs on the Law of Insurance, p. 890, Right to reformation in action at law. In this view of the case the exclusion of the defendant's evidence to show an alleged misdescription of the property did not operate to the defendant's prejudice. If it had established such error, the court should then have corrected it and have enforced the policy as corrected. In the light of this result we need not consider what effect the provisions of sec. 1945*a*, Stats. (Supp. 1906: Laws of 1905, ch. 51), have as to this question and we therefore do not determine it.

It is also contended that the plaintiff cannot recover on this policy because she failed to show any interest in the property described in the policy. As heretofore stated, there is no dispute under the evidence that plaintiff had an insurable interest in the buildings covered by the policy. The policy provides, in cases of insurance on buildings, that the policy shall be void unless the fee title to the premises described in the policy is in the plaintiff and unless her interest be a sole and unconditional ownership. The application stated that the plaintiff had an interest in the lands under a contract for a deed. This was the representation made by her in the application, and having thus been brought to the knowledge of the company it formed the basis of the contract. When such facts are established, the insurer is estopped from asserting the invalidity of the policy upon the ground that the insured had not a fee title or a sole and unconditional ownership, as stipulated in the policy. Under a well recognized rule in the law of insurance, an insurer is not permitted to assume one attitude as to known facts in the making of the contract and later insist upon another to the injury of the insured. In such a case, to prevent avoidance of the policy, the insurer is estopped from assuming such different and inconsistent attitudes. *Welch v. Fire Asso.* 120 Wis. 456, 98 N. W. 227; *Beal v. Park F. Ins. Co.* 16 Wis. 241; *McBride v. Republic F. Ins. Co.* 30 Wis. 562.

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It is however contended that this principle cannot rule this case, because the plaintiff failed to show she had any interest in the land at the time the policy issued or at any time thereafter, and hence the policy is wholly void under its conditions respecting title. The trial court held that the defendant was precluded from asserting the invalidity of the policy on this ground, because of its failure to attach the application to the policy, as required by the provisions of sec. 1945*a*, Stats. This section provides that all fire insurance companies, except domestic mutual companies, shall attach or indorse a true copy of the application or representations of the assured to the policy when issued, if its terms make them a part thereof or if they in any manner affect the validity of the policy, and further provides that "the omission to so do shall not render the policy invalid, but if any corporation neglect to comply with the requirements of this section it shall forever be precluded from pleading, alleging or proving such application or representations or any part thereof, or the falsity thereof or any part thereof in any action upon such policy. . . ." It is without dispute that the plaintiff signed a written application for this policy and that a true copy thereof was not attached to or indorsed on the policy. There can be no controversy that its contents under the terms of the policy and the law governing the rights of the parties under the policy affected its validity, and hence the statute required that a true copy thereof be attached thereto. The question is, What effect does the failure of defendant to so do have upon the questions presented by the record, namely, that the plaintiff had no fee title or such interest in the lands as was demanded by the conditions of the policy? The contention is that these conditions operate as conditions precedent to any recovery on the policy, unless their effect is avoided by facts showing that they had been waived or that the company is estopped from insisting on the conditions. It is a familiar rule in the law of this state that such conditions in a policy may be waived by

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the conduct of the company through its agents and officers and that it may by such conduct estop itself from asserting a violation of such conditions in the policy. *Beal v. Park F. Ins. Co.* 16 Wis. 241; *McBride v. Republic F. Ins. Co.* 30 Wis. 562; *Smith v. Commonwealth Ins. Co.* 49 Wis. 322, 5 N. W. 804; *Welch v. Fire Asso.* 120 Wis. 456, 98 N. W. 227, and cases cited. This statute provides additional and specific grounds by which the company may estop itself from insisting on compliance with conditions affecting the validity of the policy, namely, by failing to attach to or indorse on the policy a true copy of the application or the representations of the assured which may in any manner affect the validity of the policy. The omission so to do shall, among other things, estop it from showing the falsity of any part of the application or the representations. Admittedly, the application in this case contained a representation as to the title and the interest of the plaintiff in the premises, and it was not as stated in the policy, namely, a fee title, but it was an interest acquired by a contract for a deed. By defendant's default to comply with this statute the rights of the parties became fixed as to this condition in the policy by the representation of title in the written application. It therefore follows that when the plaintiff produced the policy and the separate application and showed that the property destroyed was actually covered by the policy she established a *prima facie* claim against the company under the contract, which the company is estopped from defeating by proof that the representation in the policy as to her title was untrue. The effect of the statutory provision is that, when the insurance company failed to comply with the statute, this failure operated to estop it from defeating plaintiff's right to indemnity under the policy for the loss she sustained to her insurable interest in the property upon the ground of the breach of condition respecting title. Under the facts shown there is no question that she owned the buildings and their contents as covered by the policy. If the evi-

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dence showed that she had no insurable interest in the property destroyed, then her claim under the policy might have been defeated upon the ground that the contract was void as against public policy. Under the circumstances any parol evidence tending to impeach the representations of title to the property as stated in the application is incompetent and immaterial, for the reason, as above stated, that the company is estopped from impeaching the validity of the policy by asserting a variance from the representations in the application.

We find no reversible error in the record.

By the Court.—Judgment affirmed.

BARNES, J. (*dissenting*). I fail to see wherein sec. 1945*a*, Stats. (Supp. 1906: Laws of 1905, ch. 51), has any application to the facts in this case. Manifestly that statute was passed to prevent insurance companies from attempting to defeat recovery on insurance policies by showing misrepresentations made by an insured in his application for insurance unless a copy of such application was attached to the policy issued.

The main question in this case is very simple. The statutory form of policy provides that the insurance shall be void if "the subject of insurance be a building on ground not owned by the insured in fee simple." Sec. 1941—46, Stats. (1898). It was competent for the insurer to waive this provision, and the complaint alleged that it was waived by stating that the insured was the owner of the buildings destroyed and "of the land on which the said buildings were situated, under and by virtue of the contract or agreement disclosed in the application" for insurance, and that the fact that plaintiff "owned the said land on a contract and had not yet obtained her deed for it was disclosed by her to the said company at the time the said contract of insurance was made," and that ever since said time defendant has had "knowledge of the fact

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that the plaintiff owned the said land by contract," and had not obtained a deed therefor.

Plaintiff attempted to prove the waiver by requiring defendant to produce the application for insurance and by offering it in evidence when produced. It contained the following: "*Q.* What title has applicant to premises? *A.* Contract for a deed." Plaintiff sought to supplement this proof by showing that she did have such a contract, but in this she was wholly unsuccessful. The proof showed that she never had a contract for nor the semblance of a title to the land on which the buildings stood, except naked possession.

The legal question presented by the undisputed facts in the case is this: Where a policy provides that it shall be void if buildings are covered unless the insured owns the ground on which they stand, and where the insured informs the insurer before the policy is written that she does not have a fee-simple title but has a contract which entitles her to a deed when it is complied with, and the insurer writes a policy with this knowledge, does it do anything more than waive the fee-simple title and agree to accept in lieu thereof the equitable title which a land contract conveys? I think not. The defendant agreed to accept such title as a land contract would convey, but it did not agree to insure buildings on premises to which the insured had no right, title, or interest whatsoever. Under a contract plaintiff would be entitled to a deed when she performed its conditions and could protect herself as to the improvements which she made on the land. Circumstanced as she was, at best all she could do would be to tear down the buildings and remove the fragments. The difference between the moral hazard in the two situations is obvious. An insurer might well accept insurance where the title was such as a land contract conveyed, and refuse to take any risk on property where there was an entire absence of title. "A waiver is the intentional relinquishment of a known

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right." *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 22, 85 N. W. 685; *Swedish Am. Nat. Bank v. Koebernick,* 136 Wis. 473, 479, 117 N. W. 1020; *Voss v. Northwestern Nat. L. Ins. Co.* 137 Wis. 492, 502, 118 N. W. 212; *Pfeiffer v. Marshall,* 136 Wis. 51, 116 N. W. 871; *Rasmusen v. New York L. Ins. Co.* 91 Wis. 81, 64 N. W. 301; *Fraser v. Ætna L. Ins. Co.* 114 Wis. 510, 90 N. W. 476. There is no claim that the insurer had any knowledge of the condition of the title aside from that disclosed by the application, and it seems to me wrong to say that by its agreement to accept a land-contract title it agreed also to accept no title at all.

The opinion seems to proceed upon the theory that the defendant could claim no benefit from the application because it was not attached to the policy. I do not understand that it claims any. It pleaded a forfeiture under the terms of the policy. Every shred of evidence in the case in reference to the application and in reference to the plaintiff's title was offered by the plaintiff herself. The contention of the defendant was and is that plaintiff had not proved a cause of action, because she showed affirmatively that she had no title to the land and that defendant did nothing to waive its right to assert that the policy was void on the facts so shown. I think the judgment should be reversed.

WINSLOW, C. J., and MARSHALL, J. We concur in the foregoing opinion by Mr. Justice BARNES.

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JOHNSON, Respondent, vs. TOWN OF IRON RIVER, Appellant.

March 13—April 3, 1912.

Highways: Injury from defect: Negligence of town: Contributory negligence: Questions for jury: Trial: Improper statements by counsel: Evidence: Instructions to jury: Appeal: Harmless errors.

1. Where a stump was situated within a few inches of the traveled track of a highway, with a root projecting into that track, at a point where the highway curved and began to descend, the jury was warranted in finding that it constituted a defect in the highway; and where the stump had occupied that position from time immemorial the jury was justified in finding that the town authorities in the exercise of ordinary care ought to have known of the defect and remedied it.
2. Where an injury to a person traveling on a highway in a light vehicle was caused by the sudden slipping or stumbling of one of the horses and the consequent swinging of a wheel against a stump, there being no proof of excessive speed or of any great or long-continued inattention to his team upon the part of the driver, the question as to negligence of the driver was one for the jury, although he was not at the time intently watching the team.
3. A statement by plaintiff's counsel, in opening his case to the jury, that defendant's counsel had "said last night that he had a witness who would testify that the persons in the vehicle in question were intoxicated," is not ground for reversal, even though defendant's counsel did not make the remark attributed to him in the presence of the jury.
4. Plaintiff's counsel asked some questions to which objection was made and sustained, and in answer to an inquiry by the court said that he wished to prove that plaintiff, at or soon after the time of her injury, said to her son-in-law that she wished to go home because she thought she was going to die. The jury was instructed to disregard this statement. *Held*, that there was no prejudicial error.
5. It was error to admit testimony of the plaintiff to the effect that her attending physician had told her she had ribs broken by the accident; but such error was not prejudicial where the physician, as a witness, described the injuries in detail and said

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that he did not know whether any ribs were broken, and there were other serious injuries, and the damages awarded were not excessive.

6. It was not error to admit evidence that there was ice on the highway at the point in question, to explain the slipping of the horse.

7. An error in charging the jury that it was the duty of the town to keep the highways in a *safe* condition, instead of in a reasonably safe condition, for travel, did not in this case affect any substantial right of the defendant, there being ample evidence to show a defect of long standing.

8. To charge the jury that plaintiff can recover in the action if the evidence shows something which confessedly the evidence does not show, is not an error prejudicial to the defendant.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

C. F. Morris, for the appellant.

For the respondent there was a brief by *Ernest Sauve* and *A. W. McLeod,* and oral argument by *Mr. McLeod.*

TIMLIN, J. There was a verdict and judgment for the respondent in this action against the appellant for injuries occasioned by a defect in a highway. The highway became such by user. At a point where the highway curved to the right going south and began to descend, there was a stump within a few inches of the nearest traveled wheel track having a root projecting into that wheel track. The evidence tended to show that while respondent was riding in a light vehicle drawn by two horses on said highway on March 17, 1910, one of the horses slipped on the icy road, causing the team to swing toward the right and bring the wheels of the vehicle in contact with this stump, throwing the respondent out and injuring her. The appellant contends that a verdict should have been directed in its favor.

We think the proximity of the stump to the wheel track and its situation with reference to the curve and descent in the

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highway was such that the jury was amply justified in finding it constituted a defect. It seems to have occupied this position from time immemorial. Hence the jury was justified in finding that the defendant, in the exercise of ordinary care, ought to have known of this defect and removed it.

Assuming that the respondent is chargeable with the contributory negligence, if any, of the driver of the vehicle, there is evidence to support the negation of such contributory negligence. The driver was not at the time intently watching his team. A sudden slip or stumble of one of the horses swung the wheel over against the stump. There is no proof of an excessive rate of speed or of any great or long continued inattention to his team on the part of the driver, and the negligence of the latter seems to have been fairly a question for the jury.

It seems that in opening his case to the jury respondent's counsel stated that appellant's counsel had "said last night that he had a witness who would testify that the persons in the vehicle in question were intoxicated." The record does not show whether appellant's counsel said this or not. Exception was taken to this statement of respondent's counsel and the court declined to rule on it because he was not paying any special attention to the argument of counsel at the time. Appellant's counsel assures us that he did not make the remark attributed to him in the presence of the jury and argues that therefore respondent's counsel had no right to use the same in his opening statement to the jury. Perhaps not. But it is entirely too trivial a circumstance on which to base a reversal.

Respondent's counsel asked some questions which were objected to and the objection was sustained. The court asked him what he wished to prove, and in answer he said he wished to prove that the respondent, at or soon after the time of her injury, said to her son-in-law, in substance, that she wished to go home because she thought she was going to die. The court instructed the jury to disregard this statement. The

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evidence was not given. This assignment of error is also unimportant.

A more serious question arises upon the ruling of the court permitting the respondent to testify that her attending physician told her she had ribs broken by the accident. This ruling was erroneous. But the attending physician was a witness and described the injuries in detail, not including any fractured ribs, and in answer to the question whether any of the ribs were broken said in substance that he did not know. There were other quite serious injuries. The verdict was for $950 damages, which are not excessive, and therefore we cannot say that the appellant was prejudiced by this erroneous ruling.

There was no error in admitting evidence of the fact that there was ice in the highway at the point in question, that being a mere collateral circumstance to explain the slipping of the horse.

Exception is taken to the following alleged errors in the instructions: (1) The court charged the jury: "It is the duty of the town authorities to keep the highways in their town, used for public travel, in a safe condition for persons, whether they go upon foot or in wagons." The rule of law often stated by this court is that the duty in question is to keep such highways in a reasonably safe condition for travel. The charge in this respect was erroneous. *Strong v. Stevens Point,* 62 Wis. 255, 266, 22 N. W. 425. We are next to inquire whether this error was prejudicial. The statute, sec. 3072*m* (ch. 192, Laws of 1909), provides that no judgment shall be reversed or set aside . . . on the ground of misdirection of the jury or the improper admission of evidence . . . unless in the opinion of the court to which the application (to reverse) is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment. This statute requires more than

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mere error to appear in order to effect a reversal. It must affirmatively appear to us from the whole record that this error has affected some substantial right of the appellant. We are first confronted with the evidence relating to the defect. That, as stated, is ample. It is not probable that any jury would find there was no defect or insufficiency on this evidence. That the defect was of long standing is uncontroverted. The error relates solely to the duty of the defendant, hence could not have affected the verdict in any other particular essential to a recovery. Therefore it does not appear to us that this error has affected any substantial right of the appellant.

The court further instructed the jury that if they found from the evidence that the defendant through its officers, in the exercise of ordinary diligence, might and ought to have known that the stump in question was situated so near the traveled track as to render the highway dangerously defective at the place in question for the use of travelers in the exercise of ordinary care, and the team attached to the wagon in which the plaintiff was riding was driven with ordinary care and the wagon slewed (meaning slid) against the stump and the plaintiff was injured by being thrown from the wagon, and she was in the exercise of ordinary care also at the time, they might find a verdict in favor of the plaintiff. It is said this is erroneous because there is no evidence that the wagon slid. If so, such an error could not prejudice the appellant although it might prejudice the respondent. To state affirmatively that the plaintiff can recover in an action if the evidence shows something which confessedly the evidence does not show cannot prejudice the defendant.

By the Court.—Judgment affirmed.

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DAWSON, Respondent, vs. BAUCH and others, Appellants.

March 13—April 3, 1912.

Mortgages: Statutory form: Foreclosure by advertisement: Statute construed.

1. **No power of sale is imported into the statutory form of mortgage by sec. 2209, Stats. (1898), and that statute authorizes the foreclosure of such mortgages only in the manner that other mortgages which do not contain a power of sale are foreclosed.**
2. **A statutory form of mortgage cannot be foreclosed by advertisement, such foreclosure being restricted by sec. 3523, Stats. (1898), to mortgages containing a power of sale.**

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The cause was submitted for the appellants on the brief of *W. S. Cate,* attorney, and *C. A. Lamoreux,* of counsel, and for the respondent on that of *Sanborn, Lamoreux & Pray.*

BARNES, J. It is conceded that this judgment must be affirmed if a statutory form of mortgage cannot be foreclosed by advertisement. Sec. 3523, Stats. (1898), authorizes such method of foreclosure only as to mortgages containing a power of sale. The statutory form of mortgage contains no power of sale, unless such a power is imported into it by sec. 2209, Stats. (1898), which provides that such a mortgage "shall have the effect of a conveyance of the land therein described, together with all the rights, privileges and appurtenances thereunto belonging in pledge to the mortgagee, . . . for the payment of the indebtedness therein set forth, with covenant from the mortgagor that all taxes and assessments levied and assessed upon the land described, during the continuance of the mortgage, shall be paid previous to the day appointed by law for the sale of lands for taxes as fully as the forms of mortgage now and heretofore in common use in this state, and may be foreclosed in the same manner and with the same

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effect upon any default being made in any of the conditions thereof as to payment of either principal, interest or taxes."

This statute does not import into the form of mortgage therein provided for all the covenants, powers, and conditions found in forms of mortgage that were in existence when the statute was passed. It provides for two things: (1) that the mortgage shall convey the property therein described as a pledge for the payment of the debt thereby secured, and (2) by virtue of the statute such mortgage shall in effect contain a covenant against taxes. No power of sale is carried into the mortgage by the statute. The provision that a statutory form of mortgage may be foreclosed as other mortgages are does not help the appellants. It means that such a mortgage may be foreclosed in the same manner that other mortgages are which do not contain a power of sale. It follows that the judgment of the circuit court is correct and must be affirmed.

By the Court.—Judgment affirmed.

West, Administrator, Respondent, vs. Bayfield Mill Company, Appellant.

March 13—April 3, 1912.

Appeal: Law of the case: Decision on former appeal: Master and servant: Death caused by unguarded gearing: Contributory negligence: Duty of servant to notify master of defects: Duty of master as to guarding gearing: Instructions to jury: Damages: Evidence: Measure of widow's loss: Excessive damages.

1. The decision of this court on a former appeal, that the question whether or not the gearing by which plaintiff's intestate was injured was securely guarded was one for the jury, is conclusive on a second trial, where the evidence for plaintiff is substantially the same, although additional contradictory evidence is given on behalf of the defendant.

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2. Failure of an employee in a sawmill either to notify his superior that a board guarding a gearing was off or to repair it himself with the tools at hand, during an interval of ten minutes when the mill was not running, cannot be said as a matter of law to have been contributory negligence, it appearing that he had numerous duties to perform during such interval.
3. In an action to recover for a personal injury causing death it was not error to refuse a requested instruction as to contributory negligence which, though perhaps not absolutely erroneous, was unnecessarily long, involved, and lacking in clarity.
4. It is not always an absolute duty of an employee, upon discovering that machinery at which he is at work is out of repair, to inform his master of that fact; and a requested instruction laying down an unbending rule of that nature was properly refused.
5. Whether or not such a duty rests upon the employee may depend on numerous circumstances, such as the character of the defect, whether it be serious or trifling, the apparent imminence of danger therefrom, and the duties of the employee in other directions.
6. An instruction to the effect that an employer was required to guard a dangerous gearing "in such a manner" as is usually done by employers of ordinary caution in the same line of business and under the same circumstances, is construed as relating to the effectiveness of the guard and not to the particular method employed, especially as that idea was clearly expressed in another part of the charge; and thus understood the instruction was not misleading.
7. It being admitted that plaintiff's intestate was caught in the gearing of the defendant's mill and that he died as a result of the injuries received, evidence as to the distressing condition of his body after the machinery was stopped should not have been received.
8. In an action brought for the benefit of a widow to recover for the death of her husband, the damages are limited to the pecuniary loss to the widow, and that loss is to be measured by the reasonable value of her support and protection during the probable lifetime of the deceased and such sum as she might reasonably expect to receive at his death out of the accumulations which he might probably make.
9. For the death of a laboring man fifty-three years of age, whose earnings did not exceed $500 per year and who had accumulated nothing at the time of his death, an award of $7,500, reduced by

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the trial court to $6,600, was still too large, and the judgment is accordingly reversed, with the option to plaintiff to remit all in excess of $4,750, the amount awarded by the jury on a former trial.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action to recover damages for the death of one Philip La Pointe, plaintiff's intestate, which death is alleged to have been caused by the defendant's failure to securely guard a certain bevel gearing at the side of a live-roller table in the defendant's sawmill. A judgment for the plaintiff upon a previous trial was reversed by this court for error, and is reported in 144 Wis. 106, 128 N. W. 992. The machinery is there more fully described and it seems unnecessary to repeat the description here. Upon the present trial the jury returned the following special verdict:

"(1) Did the defendant use ordinary care to securely guard the gearing in which the deceased, Philip La Pointe, was injured before said accident? *A.* No.

"(2) If you answer question No. 1 by 'No,' was the failure of the defendant to use ordinary care to securely guard said gearing the proximate cause of the injuries to the deceased? *A.* Yes.

"(3) Did any want of ordinary care on the part of the deceased proximately contribute to produce his injuries? *A.* No.

"(4) What sum will compensate for the death of plaintiff's intestate, Philip La Pointe? *A.* $7,500."

Motions to change the answers and for judgment for defendant were overruled, but defendant's motion for a new trial was granted unless plaintiff remitted $900 from the verdict. The plaintiff filed a remission in accordance with this order and judgment was entered for the plaintiff for $6,948, damages and costs, from which the defendant appeals.

For the appellant there was a brief by *Williams & Stern,* and oral argument by *B. F. Williams.*

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For the respondent there was a brief by *H. W. Dietrich,* attorney, and *John Jenswold, Jr.,* of counsel, and oral argument by *Mr. Dietrich.*

WINSLOW, C. J. It was argued by appellant now, as it was argued upon the previous appeal, that the court should have directed a verdict for the defendant because it appeared as matter of law (1) that the defendant had securely guarded the gear, and (2) that the deceased assumed the risk or was guilty of contributory negligence, or both. These contentions were overruled upon the previous appeal, and that decision would, on familiar principles, form the law of the case upon the second trial if the evidence were substantially the same. The plaintiff claims, however, that there was additional evidence on the present trial tending to show a different state of facts from that shown by the evidence on the former trial. It is true that upon the present trial there was evidence on the part of the defendant not given on the former trial tending to show that the guard board, in addition to being nailed at the top, was supported by two upright 2 x 10's against which the inner face of the board rested, thus preventing it from bending inward under pressure. On the part of the plaintiff, however, the evidence of several witnesses was substantially the same as before, to wit, that the board was only held in place by nails along the top edge and had no other support. This evidence was not inherently incredible, and if believed by the jury would present exactly the same condition in this respect as was considered by this court upon the former appeal, hence the decision then made is conclusive now.

Again it is said, upon the question of contributory negligence, that the former decision is not conclusive because there is evidence now to the effect that the mill stopped sawing for about ten minutes prior to the accident, hence that the intestate had ample time to either notify his superiors of the fact

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that the guard board was off, or to have repaired it himself with tools which were proven to be near at hand. There seem to be two answers to this contention: *first,* the sawyer testifies that sawing was actually going on at the time of the accident; and *second,* the deceased had numerous duties in connection with turning and straightening of cants, the operation of the resaw, the scraping of rotten logs and bark from the carriage track, and the changing of saws, and it cannot be said that the evidence clearly shows that he had ample time to make the repair himself or notify his superior of the necessity therefor, even if it be conceded that it was his duty to do either of these things under any circumstances.

The following instructions requested by defendant were refused, and error is assigned upon each of these rulings:

"In connection with question 3, you are instructed that the plaintiff was guilty of a want of ordinary care, if you find from the evidence that had the plaintiff exercised any care or caution which was under the circumstances reasonable, practical, and available, he might have avoided the injuries resulting in his being caught in the gear in question, and in case you so find, your answer to question 3 will be 'Yes.'

"In respect to question 3, you are instructed that when an employee discovers that the machinery in connection with which he is obliged to work is out of repair, it is his duty to inform his master of this fact, and if you find from the evidence that the deceased, Philip La Pointe, had reasonable opportunity, after he discovered that the guard board over the gearing in question was off, to inform any person in authority in the defendant's employ of such fact, prior to his accident, then he was guilty of negligence in failing to report such fact, and your answer to question 3 will be 'Yes.' "

As to the first of these instructions, while we are not prepared to say that it would have been erroneous to give it, we certainly do not think it was error to refuse it. Ordinary care has been frequently defined by this court as that care which the great majority of people would and do ordinarily use under like or similar circumstances. Some such simple

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statement as this is preferable to any long or involved definition. The instruction requested, in addition to the manifest inaccuracy of its reference to the plaintiff instead of the deceased, is certainly lacking in clarity, if not actually confusing, and we cannot say that it was error to refuse it.

The second requested instruction lays down the abstract proposition that it is the duty of an employee, on discovering that machinery on which he is working is out of repair, to inform his master of the fact. This sweeping proposition cannot be approved. No such absolute duty can be said to exist in every case. The question may depend on numerous considerations, such as the character of the defect, whether it be serious or trifling, the apparent imminence of danger therefrom, the duties of the employee in other directions, etc. It is evident that no unbending rule of this nature can be laid down, and hence the refusal of the second instruction cannot be considered erroneous, even if the latter clause thereof, standing alone, might properly have been given—a question not decided.

The court charged the jury at the request of the defendant as follows:

"In respect to question 1, you are instructed that if the defendant furnished such a guard, or as effective a guard as ordinarily careful and prudent employers in the same line of business ordinarily use, under like circumstances, it had then discharged its full duty under the law, requiring it to securely guard such gearing, and in case you so find from the evidence, your answer to this question will be 'Yes.' "

Later in the charge the following instruction was given on this same point:

"By securely guarding, the defendant was required to guard the machine in question in such a manner as is usually done by employers of ordinary caution in the same line of business and under the same circumstances, and if it did so, it discharged the duties imposed upon it and the guard so furnished is in the legal sense reasonably safe and the alleged dangerous machine has been securely guarded within the

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meaning of the statute, and if you find and believe from the whole evidence that this is the fact you will answer question number 1 by 'Yes.' "

Error is here charged because it is said that the second of these instructions absolutely required the defendant to guard the gearing in the manner usually employed by other employers, whereas it could discharge its duty equally well by furnishing as effective a guard as other ordinarily careful employers furnish, though not the same kind. This last idea is expressed in the first instruction quoted above, and it must be admitted that the second instruction is not happily worded, especially in the use of the word "required." We do not think, however, that the jury could have been misled by the inaccuracy. In view of the fact that no intimation was given to the jury of any intention to modify or withdraw the first instruction, we think the jury must have understood the words "in *such* manner" in the second instruction to refer to the effectiveness of the manner of guarding rather than to the manner of its physical construction. In this view the two instructions are entirely harmonious and correct.

The only other contention which we deem of sufficient importance to require treatment is the contention that the damages, after reduction by the trial court, are excessive. In this connection it is to be noted that the trial court, against timely objection, allowed evidence to be introduced showing the distressing, almost revolting, condition in which the body of the deceased was found when the machinery was finally stopped. There was no legitimate excuse for the introduction of this evidence. It was fully admitted by the defendant that the deceased was caught in the gearing and that he died as a result of the injuries received thereby. The only questions were whether the uncovered gearing constituted negligence, and whether, if so, the deceased was guilty of contributory negligence. Upon these questions the shocking condition of the body cast no light. The evidence could only tend to ex-

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cite the sympathies and perhaps the passions of the jury, and it should not have been allowed. Had the deceased survived and brought action for the injuries which he received, it might with some reason be claimed that this evidence was admissible, because he would be entitled to recover for his pain, suffering, and disfigurement. But there can be no such elements in the recovery in this action. Here the damages are limited to the pecuniary loss of the widow. *Rudiger v. C., St. P., M. & O. R. Co.* 101 Wis. 292, 77 N. W. 169. That loss is to be measured by the reasonable value of the widow's support and protection by the deceased during the time he would probably have lived, adding thereto such sum as she might reasonably expect to receive at his death out of the accumulations which he might probably make during his expectancy of life. *Rudiger v. C., St. P., M. & O. R. Co., supra.*

The plaintiff in this case was fifty-three years of age and was a laboring man. His widow was fifty-one years of age. He had accumulated nothing and could not therefore be expected to make any accumulations during the remainder of his life. He was earning $1.75 per day during the mill season. At times he had received $2.25 per day. He worked in the woods for three or four months during the winter at about $35 per month. In addition he raised some garden produce, but his total income at the time of his death could not probably exceed $500 per year, and must be expected to decrease as he grew older.

His expectancy of life under the American experience tables was 18.79 years. Had he lived his wife could not, of course, reasonably expect to receive his entire earnings during that expectancy; a reasonable amount for his own support and clothing would first have to be deducted. Her damages must necessarily be limited to such sum as, being put at interest, will each year, by taking a part of the principal and adding to the interest, yield the amount which she would in all rea-

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sonable probability have received from him by way of support and protection during his expectancy of life.

Assuming that the deceased would earn just as much every year during his expectancy of life as he was earning at the time of his death (which is of course a practical impossibility), and that his wife might expect to receive $400 out of his yearly earnings of $500 each year (an amount which is plainly excessive), the present value of an annual allowance of $400 during his expectancy of life at five per cent. would be but $4,838.12 under the standard annuity tables. This sum in cash would purchase an annuity of $400 for his expectancy of life. The circuit judge was evidently convinced that the damages were excessive, and hence required the plaintiff to remit $900 from the verdict. On what basis he computed the amount of the remission we are not able to understand. If $7,500 was excessive, $6,600 was also excessive. The true rule is that where excessive damages are awarded by the jury in actions of this nature and there is no other prejudicial error, the trial court, or this court upon appeal, may properly end the matter without further litigation by giving the plaintiff the option to remit from the verdict a sum which will make the damages as small as a fair and unprejudiced jury would probably name. *Heimlich v. Tabor,* 123 Wis. 565, 102 N. W. 10; *Hackett v. Wis. Cent. R. Co.* 141 Wis. 464, 124 N. W. 1018. To allow a verdict for any larger sum than this would be to infringe upon the defendant's right of jury trial.

In the present case we have data upon the subject in the shape of the verdict for $4,750 rendered by the jury upon the former trial. That verdict was not attacked as prejudiced or excessive and it seems may well be considered to be as low a sum as an unprejudiced jury would probably name.

By the Court.—Judgment reversed, with costs, and action remanded for a new trial; with the option to the plaintiff, at

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any time within thirty days after notice of the filing of the *remittitur* in the circuit court, to elect to enter judgment for $4,750 damages and costs.

On April 23, 1912, the foregoing mandate was amended by adding thereto the words: "Interest to be computed on the damages from the date of the verdict."

GAGER, Appellant, vs. STOLLE-BARNDT LUMBER COMPANY, Respondent.

March 13—April 3, 1912.

Master and servant: Injury from defects in car received from railroad for loading: Presumptions as to condition of car: Duty to inspect.

1. **Where a railway company places a freight car, with brakes set, on a sidetrack to serve the business of a proprietor whose employees are expected, according to custom, to move the car to the particular point for loading, such proprietor has a right to presume that it is in suitable condition for use, unless the contrary appears without particular or technical inspection, in the absence of obvious defects or knowledge of some fact or circumstance, actually or constructively brought home to such proprietor, which would ordinarily put an ordinarily careful person on such inquiry as to lead to knowledge of a contrary condition existing. So *held* in an action against the proprietor by an employee alleged to have been injured by reason of defects in the brake of such car.**
2. **The proprietor in such case is bound to observe defects which would naturally and ordinarily attract the attention of a person so circumstanced, having no duty to look particularly or search for such difficulties.**

APPEAL from a judgment of the circuit court for Lincoln county: A. H. REID, Circuit Judge. *Affirmed.*

Action to recover for a personal injury.

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Plaintiff was engaged in a lumbering business at Tripoli, Wisconsin, on the Soo Railroad. The business was served by the railroad company by means of a switch track owned by it whereby freight cars to take out lumber, several at a time if necessary, could be set in to the planing-mill platform from the main track. The practice was for trainmen to place cars at a convenient place for the lumber company on the switch track and set the brakes and for its servants to move them down to the desired position for loading, as required, and move them out of the way after loading; the moving being done by means of a pinchbar or a block and tackle and team. The track was constructed with a slight down grade from the main track so as to facilitate the moving of cars. In moving a car it was necessary for a man to be at the brake to release it in starting and to control the car thereafter. Plaintiff, in performance of his duties at the time in question, was engaged, with the block and tackle and a team, in so moving a car. There was a man at the brake, the block was fastened to the car by means of a short piece of chain, and the anchor end of the working chain was attached to the side of the track about sixty-five feet from the car, by means of a grab hook. In due course, the brake was released, plaintiff gave his team the word, he being in an appropriate position, and the car started. After it had moved a few feet, the team being on the east side of the track, he drove to the other side so the chain would not get caught under the east wheel. As he did so some complication occurred causing the team to be drawn back toward the car. He became fearful that the team and the car might collide and so endeavored to unhitch the team by loosening the chain from the whiffle-trees. To do that he took the reins in his left hand and worked at the chain with his right, trying to get slack enough to enable him to accomplish his purpose. While so engaged, the chain passed rapidly through the pulley near the car as the whiffle-trees neared it. He did not appreciate his danger till the hand that was on the chain came

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in contact with the pulley and was drawn in and injured. The man on the car observed that plaintiff was having some difficulty, and exerted himself to the best of his ability to stop the car by setting the brake. Had it worked properly he would have succeeded. Something was out of order by reason of which he was unable to stop the car till it had moved a considerable distance down the track from where the accident occurred. There was evidence tending to show that the brake chain would slip off of the end of the brake rod before being tightened up efficiently, thus preventing the brakeman from controlling the car. There was also evidence to the effect that such a condition might exist in such a braking appliance from any one of several causes. There was an entire failure of evidence as to what particular defect caused the difficulty at the time in question, and as to whether any was discoverable without a particular inspection, and, further, as to whether the particular difficulty would have manifested itself except by an actual trial of the brake when the car was in motion. It was undisputed in the case that neither defendant's superintendent nor any one in its employ knew of the brake being out of order till the occasion in question.

The cause was submitted to the jury resulting in a finding, among others, that the defective condition of the brake was not discoverable before the accident by inspection of the car by an ordinarily intelligent person, using ordinary care, while the car was at rest. Having so found, the jury omitted any finding as to proximate cause.

On the subject of inspection the jury were instructed, in effect, that it was the duty of defendant to make such general external examination of the car as is ordinarily made under the same or similar circumstances, so as to discover and appreciate obvious defects caused by want of repair; that a particular inspection was not required; that defendant had a right to assume that all parts of the car, which upon general

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observation appeared to be in proper condition, were so; that if the jury could not be satisfied from the evidence that there was any particular defect observable from such inspection as a person circumstanced like defendant would ordinarily make, they could not answer the question "Yes."

The court gave judgment on the verdict for defendant.

For the appellant there were briefs by *Van Hecke & Fisher* and *F. J. Smith,* and oral argument by *W. E. Fisher.*

For the respondent there was a brief by *Ralph E. Smith,* attorney, and *Edward M. Smart,* of counsel, and oral argument by *R. N. Van Doren.*

MARSHALL, J. Neither in principle nor authority can we perceive any infirmity in the doctrine which the trial court applied to this case and ruled it, viz.: if a railroad company places a freight car, with brake set, on a sidetrack for the purpose of serving a particular business, the employees there being expected, according to custom, to move the car to the particular point for loading material or articles thereon, the proprietor of such business has a right to presume that it is in suitable condition for use, unless the contrary appears without particular or technical inspection, in the absence of obvious defects or knowledge of some fact or circumstance, actually or constructively brought home to such proprietor, which would ordinarily put an ordinarily careful person on such inquiry as to lead to knowledge of a contrary condition existing. The proprietor of such business is bound to observe defects which would naturally and ordinarily attract the attention of a person so circumstanced, having no duty to look particularly or search for such difficulties.

The situation of respondent was as above indicated. When it found the car on the sidetrack leading to its loading place, it was consistent with ordinary care to assume that the brake appliance was in proper condition. There was nothing to in-

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dicate otherwise, as the car stood on the track, unless one searched for imperfections. The jury so found, which entitled respondent to judgment.

Some complaint is made of the instructions which need not be discussed. They were probably more favorable to appellant than he was entitled to. They were to the effect that, it was the duty of respondent to make an ordinary external examination for the purpose of discovering whether the car was in a reasonably safe condition. As before indicated, it was not respondent's duty to look for defects. It had a right to assume, under the circumstances, that the car was in proper condition for use. The act of setting the car in therefor involved a representation that it was in such condition, which respondent had a right to rely on except as to obvious defects, and there were none. Such a case is not within any rule requiring an inspection. It is simply within the rule that one must see defects which are open and obvious to ordinary attention of a person working with the appliance under the circumstances of its use. Such a person would naturally proceed upon the theory that no substantial defects existed in an appliance furnished to him by the owner for his use. The rule does not apply as in case of a railroad receiving cars from a connecting line, which are liable to become out of repair in the course of transit to the place of transfer, but the one in case of furnishing an implement for use under such circumstances as to suggest that it is ready therefor.

By the Court.—The judgment is affirmed.

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JORDAN LAND COMPANY and others, Appellants, vs. FREEBORN and others, Respondents.

March 14—April 3, 1912.

Drainage districts: Organization: Who may petition: Corporations are "adult owners" of land: Statutes construed.

Corporations owning land in a proposed drainage district are "adult owners" of such lands within the meaning of sec. 1379—11, Stats. (Supp. 1906: Laws of 1905, ch. 419), and as such may petition for the organization of the district.

APPEAL from a judgment of the circuit court for Juneau county: BYRON B. PARK, Judge. *Reversed.*

This is a proceeding to establish the Cutler drainage district in Juneau county. It appearing that certain lands had by mistake been included within the boundaries of the proposed drainage district, the circuit judge made an order amending and changing the boundaries of the proposed district as set forth in the original petition. The proposed district as thus changed embraced 20,800 acres.

The petition for the organization of the district states that the petitioners are all more than twenty-one years of age and are the owners of more than one half of the lands embraced within the proposed district. The president of the *Jordan Land Company* signed in behalf of the company. The *Jordan Land Company,* it appears, owned 11,480 acres of land in the proposed drainage district and the other signers owned 1,450 acres. The *Jordan Land Company* is a corporation duly organized under the laws of this state. It appeared during the pendency of the petition that certain owners of lands affected by the proposed organization had not been notified. They were duly notified.

The court found that the petition did not contain the signatures of a majority of the adult owners of lands within the

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proposed drainage district who were of lawful age and represented one third in area of the lands to be affected by the work, and that the petition did not contain the signatures of the adult owners of more than one half of such lands. This holding of the court was upon the ground that the *Jordan Land Company* was not authorized to sign the petition as an adult owner.

This is an appeal from the judgment dismissing the petition and discontinuing the proceedings.

For the appellants there was a brief by *Veeder & Veeder,* attorneys, and *Adams, Bobb & Adams* and *Olin & Butler,* of counsel, and oral argument by *J. M. Olin.*

For the respondents there was a brief by *H. J. Mortensen* and *McFarlane & Price,* and oral argument by *Mr. Mortensen.*

SIEBECKER, J. The drainage district statute (secs. 1379—11 *et seq.,* Stats. Supp. 1906: Laws of 1905, ch. 419) provides that "whenever a majority of the adult owners of lands within any district of land," representing one third in area of the lands therein, or whenever the adult owners of more than one half of the lands within such district, desire to organize a drainage district for the purposes and upon the conditions prescribed by law, they may file a petition containing the requisite allegations with the appropriate court, praying for the organization of the district to carry out the powers and functions authorized by the statutes. As indicated in the foregoing statement, this is a proceeding to create such a district. It is set forth in the record that the *Jordan Land Company* owned 11,480 acres of the 20,800 acres of land embraced in the proposed district and that the petition was signed by the president of the company. The other signers of the petition owned 1,450 acres of the land. Remonstrants to the petition objected to its sufficiency upon the ground that the law does not authorize the land company, as an owner of lands in a proposed district, to petition the court for the or-

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ganization of such a drainage district. The contention is that a corporation owning such lands is not within the class of landowners designated in the statute as "adult owners of lands within any district of land" which may be organized into a drainage district. The trial court held that the words "adult owners of lands," as used in the act, indicated a legislative intent to exclude corporations owning such lands from the right to petition for the organization of drainage districts. The phraseology of this section of the statutes originally conferred the right to petition for this purpose upon "owners of lands . . . who shall have arrived at lawful age," and there was similar language in the amendments thereto before the amendments by ch. 419, Laws of 1905, which dropped from the foregoing section the words "who shall have arrived at lawful age" and inserted the word "adult" before the word "owners." Manifestly, the word "adult" and the phrase "who shall have arrived at lawful age" were employed as equivalents in these statutes. The use of the word "adult," or the equivalent phrase, no doubt designates in common speech only persons who have arrived at full age or the years of manhood, and when so used does not include artificial beings such as corporations. The significance of the word "adult" is not necessarily restricted to such general meaning when employed in a statute. It is familiar that the word "person," though commonly restricted to a human being, may be applied to and include artificial beings, when employed in a statute. Instances without number exist where words in legislative acts must be interpreted as the legislature used them, though this may enlarge, restrict, or qualify their commonly accepted meanings. As instances, see *Reiche v. Smythe,* 13 Wall. 162, wherein, under a revenue act, singing birds were held not to be living animals, and *Silver v. Ladd,* 7 Wall. 219, where the words "single man" were construed to include "an unmarried woman." The particular inquiry, therefore, is not what is the abstract or colloquial meaning of

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the word "adult," but in what sense was it used in the act before us. We must collect the meaning of the word from the context and the purpose of the act in dealing with the subject matter under consideration. It is obvious from the statutes dealing with the subject of drainage that the legislature, in dealing with the right to petition for the organization of drainage districts, was disposed to confer it upon those most interested in such enterprises, namely, the landowners. A view of all the provisions to accomplish this purpose manifests the dominant idea of the legislature that the landowner is to be empowered to do what is necessary to establish drainage districts or to oppose their establishment, and to bear the accompanying burdens and obligations. To carry out these objects and determine upon their feasibility is as vital to the interests of corporate landowners as of individual landowners. These facts and conditions tend strongly to show that the legislature did not intend to exclude corporate landowners from the right to petition. The words "adult owners," as used in the statute, are sufficiently flexible to admit of including corporate owners within such legislative purpose and aim. Again, the sense of the word "adult," as here used, taken in association with the clauses in another section of the act referring to minors and others incompetent to act for themselves, indicates a grouping of these classes and that "adult" was used to distinguish this class of owners from such legally incompetent classes. All of these considerations are in harmony with and tend to bring this word within the statutory rule embodied in sec. 4971, Stats. (1898), providing that "the word 'person' may extend and be applied to bodies politic and corporate as well as to individuals," and the rule of construction specified in subd. 2, sec. 4972, Stats. (1898), which provides that "the word 'person' shall extend and be applied to bodies corporate unless plainly inapplicable." Another consideration supporting the view that corporate owners are embraced within "adult owners" is the fact that such corporate

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owners have every other right, duty, burden, or obligation of other landowners within a district. This is of weight as tending to show that the legislature, in conferring on landowners the right of petition as the process for instituting proceedings to establish drainage districts, intended to include corporate owners. We are persuaded that the trial court erred in holding that corporate landowners were not authorized to petition for the organization of a proposed drainage district.

By the Court.—The judgment appealed from is reversed, and the proceeding is remanded with directions to the court to entertain the petition for the organization of a drainage district.

WINSLOW, C. J., and MARSHALL and BARNES, JJ., dissent.

RADFORD, Respondent, vs. SMITH and wife, Appellants.

March 14—April 3, 1912.

Pleading: Counterclaim: Mortgages: Foreclosure: Agreement to notify before bringing action: Validity: Consideration: Judgment: Variance from findings: Sale in parcels: Costs: Amounts paid for delinquent taxes: Appeal: Bill of exceptions: Costs on appeal.

[1. Whether a defendant can plead a counterclaim, pay no further attention to it and ask no relief thereon from the court below, and then have relief on an appeal from the judgment because the court disregarded the counterclaim or refused relief upon it, not determined.]

2. In an action to foreclose a mortgage, an answer alleging that plaintiff had agreed that he would not bring such an action without giving notice of his intention so to do, and "that the defendants' damages by reason of the failure to give them reasonable notice of intention to bring this action as plaintiff agreed to do is $200, and the same is pleaded as a counterclaim against the plaintiff's demand upon the note and mortgage in suit," does not properly plead a counterclaim.

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3. An agreement not to bring a foreclosure action without giving prior notice to the mortgagor is void where no time of forbearance is agreed upon and there is no consideration.
4. In a foreclosure action the court found that the mortgaged premises were a homestead and could not be sold in parcels without injury to the interests of the parties. The judgment provided that the premises "or so much of them as may be sufficient to raise the amount due . . . and which may be sold separately without material injury to the parties interested, be sold," etc. *Held*, that there was no prejudicial variance from the finding.
5. Where the plaintiff in an equitable action demands costs and the court concludes and orders that the plaintiff is entitled to the relief demanded, he is entitled to judgment for costs without any further or more specific direction by the court.
6. In a foreclosure action, inclusion in the judgment of the amount paid by plaintiff for delinquent taxes cannot be held error in the absence of any bill of exceptions.
7. Where the only prejudicial error in a judgment was a mistake in amount, which would obviously have been corrected upon request and without any appeal, no costs should be allowed to appellant in the supreme court.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Modified and affirmed.*

This action was brought to foreclose a mortgage on the homestead of the defendants. The execution and delivery of the note and mortgage were admitted, and the defense set up was that since the maturity of the note the defendant *Chas. D. Smith* informed plaintiff that he was making every effort possible to raise the money; that the defendant *Chas. D. Smith* offered at various times to pay the note before it became due and plaintiff declined to receive payment, and that plaintiff agreed that he would not bring foreclosure action without giving notice to the defendants of his intention so to do, but did commence action without giving either of the defendants notice. The defendants further allege "that the defendants' damages by reason of the failure to give them reasonable notice of intention to bring this action as plaintiff agreed to do is $200, and the same is pleaded as a counterclaim against the plaintiff's demand upon the note and mortgage in suit."

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There was no reply to this so-called counterclaim. The defendants offered no evidence, did not appear in the action on the hearing or in any manner present the counterclaim to the court for adjudication or make any motion upon it, and the court made no finding upon it, and obviously it was not considered in the findings or judgment. The court made and filed its findings of fact and conclusions of law, and among other findings found that there were $250.66 delinquent taxes which had been paid or redeemed by the plaintiff, and further made the usual findings of fact and conclusions of law, and judgment was rendered thereon; but in the rendition of judgment $400.12 as delinquent taxes redeemed by the plaintiff were inserted instead of $250.66. From this judgment defendants appealed.

There was a finding by the trial court that "the mortgaged premises constitute the homestead of the defendants . . . and that said premises are so situated that they cannot be sold in parcels without injury to the interests of the parties, and that a sale of the whole will be most beneficial to them." The judgment provided "that the mortgaged premises . . . or so much thereof as may be sufficient to raise the amount due to the plaintiff . . . and which may be sold separately without material injury to the parties interested, be sold," etc.

For the appellants there was a brief by *Charles D. Smith* and a reply brief signed by *Charles D. Smith,* in person, and *Charles E. Hammersley,* of counsel; and the cause was argued orally by *Mr. Hammersley.*

For the respondent the cause was submitted on the brief of *H. E. Swett.*

KERWIN, J. Two main points are raised by the assignment of errors on this appeal, namely: (1) that the court granted defendants no relief on their so-called counterclaim; and (2) that the judgment is not authorized by the findings. It is contended by appellants that since there was no reply to the counterclaim the court should have rendered judgment in

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their favor upon it without any application by them for judgment. Whether the defendants could put in a counterclaim, even conceding that it sets up a cause of action, and pay no further attention to it and ask no relief thereon from the court below and then have relief on an appeal from the judgment because the court had disregarded the counterclaim or refused relief upon it, we need not stop to consider. The facts which constitute the basis of defendants' alleged counterclaim here were not even pleaded as a counterclaim. As appears from the statement of facts, the defendants merely alleged that their damages by reason of the failure of plaintiff to give them notice is $200, and that the same is pleaded as a counterclaim against the plaintiff's demand upon the note and mortgage in suit. But, even assuming that all the facts set up in the answer were properly pleaded as a counterclaim, they do not constitute a cause of action, for the reason that they do not show any agreement for any time of extension nor that there was any consideration for such agreement, hence the alleged agreement was void. *Fanning v. Murphy,* 126 Wis. 538, 105 N. W. 1056; *Union Nat. Bank v. Cross,* 100 Wis. 174, 75 N. W. 992. Counsel for defendants call our attention to some authorities which it is claimed support the contention that the so-called agreement was valid. But after a careful examination of these authorities we are convinced that they do not support counsel's position.

It is further argued that the judgment does not follow the findings on the question of sale of the property in one parcel. We do not regard this position tenable. The court found that the premises constituted the homestead of the defendants and are so situate that they cannot be sold in parcels without injury to the interests of the parties. The judgment substantially follows this finding. At least there is no such variance as to prejudice the defendants.

It is also insisted that under the findings the plaintiff was not entitled to costs, because in equitable actions the costs are

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in the discretion of the court. This contention cannot be sustained. The plaintiff demanded costs, and the court concluded and ordered that he was entitled to the relief demanded in the complaint, which covered costs. There are perhaps other reasons why the appellants cannot question the costs here, but it is unnecessary to consider them.

The most serious question under this head is the variance between the finding and the judgment respecting the amount due and payable as delinquent taxes paid or redeemed by the plaintiff. The appellants make some contention to the effect that under the statute (sec. 3165, Stats. 1898) the amount paid by the plaintiff for such taxes cannot be included in the judgment. But since there is no bill of exceptions here we cannot say that the finding of the court in that regard is wrong.

It is conceded that the plaintiff was entitled only to $250.66, not $400.12, amount inserted in the judgment, therefore the judgment in that regard is $149.46 too large and must be reduced accordingly. It is quite obvious that no appeal would have been necessary to make this correction, but that the plaintiff would have corrected the judgment upon request, if made before appeal taken, and since this is the only prejudicial error in the judgment and which could have been corrected without appeal, the court is of opinion that no costs should be allowed to appellants in this court. *Rust v. Fitzhugh,* 132 Wis. 549, 112 N. W. 508; *Spafford v. McNally,* 130 Wis. 537, 110 N. W. 387; *Andresen v. Upham Mfg. Co.* 120 Wis. 561, 98 N. W. 518.

By the Court.—The judgment of the court below is modified by deducting therefrom $149.46, and as so modified is affirmed as of the date of the judgment; neither party to recover costs, but respondent shall pay the clerk's fees in this court.

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PRESIDENT AND TRUSTEES OF THE VILLAGE OF KILBOURN CITY, Appellant, vs. SOUTHERN WISCONSIN POWER COMPANY, Respondent.

March 14—April 3, 1912.

Public utilities: Discriminatory contracts are invalid: Evasions of law: Evidence: Parol evidence affecting writings: Executed contracts: Municipalities on same footing as other patrons: Filing schedule of rates: Recovery for previous services: Eminent domain: Taking property devoted to another public use.

1. By a contract between a village and a power company the latter, in consideration of being allowed to flood the land occupied by the water and light plant of the village, agreed to purchase another site and erect thereon a new plant for the village, the power for which should be furnished by the company and taken and paid for by the village at current legal and reasonable rates, and further agreed to pay to the village certain sums semi-annually, to be increased at stated periods in proportion to the increase in the population of the village, which payments bore a very close relation to the value of the power which would be needed in the new plant. In an action by the village to recover sums so agreed to be paid by the power company, the evidence is *held* to sustain a finding by the trial court that the contract was in fact one for the furnishing of free power to the village,—the provisions by which the village agreed to pay for the power and the company agreed to pay certain sums to the village being inserted as a subterfuge and for the purpose of evading the public utilities law.
2. A municipal corporation which obtains its power for the operation of a municipal water and light plant from a public utility of this state stands upon the same footing as any private consumer, and under the public utilities act (ch. 499, Laws of 1907) cannot lawfully contract, directly or indirectly, for a more advantageous rate than other patrons are charged for like service.
3. A discriminatory contract is not rendered valid by the fact that it is entered into before the public utility has completed its plant or commenced to do business as such.
4. The matter of regulating rates of charge by public-service corporations and preventing discriminations is a governmental function and one over which the legislature has a right to legis-

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late within constitutional lines, and any contract, not made under direct legislative authority, which runs counter to a valid law in this regard becomes superseded thereby, although made before the law was enacted.

5. The public utilities act condemns all subterfuges whereby one consumer is called upon to pay a greater or lesser rate than that contained in the published schedule of charges, or whereby one consumer obtains a preference or advantage over another; and the regular schedule of rates cannot be departed from by making a contract which recites a consideration for the departure.

6. A statute authorizing a dam to be raised to a specified height and to flood such lands as will be overflowed thereby carries by implication the right to take the lands so flooded, even though they are already devoted to another public use.

7. Parol evidence is competent to show that a written contract apparently valid on its face was in fact made in contravention of a statute and for the purpose of evading its effect.

8. The rule that where a contract has been executed by one party, the other party, having received the benefit thereof, is estopped from asserting its invalidity even though it was *ultra vires* when made, has no application to a contract made in violation of a statute and hence in contravention of the lawfully declared public policy of the state.

9. Under secs. 1797*m*—27, 1797*m*—105, subd. 2, and 1797*m*—31 of the public utilities act, requiring schedules of rates to be filed with the railroad commission, and sec. 1797*m*—33, making it unlawful for a public utility "to demand, collect or receive any rate, toll or charge not specified in" the schedule of rates so required to be filed, it is the duty of a public utility to fix schedules of rates for the services it proposes to render, and file the same, before the services are performed, and it cannot recover for any service except as such service is covered by rates so filed.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Modified and affirmed.*

By ch. 462, Laws of 1901, certain persons were authorized to build a dam across the Wisconsin river at *Kilbourn City,* to a certain specified height, and were empowered to exercise the right of condemnation given by secs. 1777 to 1777*e,* in-

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clusive, of the Statutes of 1898. The right or franchise granted by said act was thereafter conveyed to the defendant herein, the *Southern Wisconsin Power Company,* a corporation. In the fall of 1906 said corporation commenced the construction of the dam authorized by said act. The village of *Kilbourn City* owned a piece of land fronting on the Wisconsin river above the site of the proposed dam, on which was located the waterworks and electric light plant operated by said village. In order to carry out the improvement contemplated by the act referred to, it was necessary to flood the land on which the said plant was located. Negotiations were started between the plaintiff and the defendant for the purpose of enabling the defendant to flood the land and at the same time to afford adequate compensation to the plaintiff for any damage it might sustain by reason of such flooding. Various discussions took place between the parties and a number of propositions and counter-propositions were submitted. At one time an agreement seems to have been reached between the representatives of the two parties whereby the defendant agreed to furnish power to a certain amount for the purpose of running the electric light plant and the water power plant, in consideration for which the village agreed to stand the expense of acquiring a new site and constructing a new plant. This agreement fell through, apparently because the village authorities thought that the power should be furnished indefinitely, while the power company desired to restrict its obligation to a period of twenty-five years. The contract submitted by the power company was dated in March, 1907.

Thereafter negotiations continued without any definite résult until the month of August, 1908, when a proposition was submitted by the defendant and accepted by the plaintiff. By this proposition the defendant agreed to raise the land around the pumping plant for an area of 50 x 250 feet to a height above extreme high water and to raise the wells to the same height and to build them in such a manner as to pre-

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serve the quality of the water; also to build a pump house over one of the wells and install a motor therein with a capacity equal to 500 gallons per minute, the village to pay one half of the cost of the pump and motor, but not to be called upon to pay to exceed $1,000 in the aggregate. In addition defendant through its representative offered to furnish free power for operating the water and light plants for a period of twenty-five years. All other changes required by raising the water in the dam were to be paid for by the village. This proposition provided that a formal contract was to be entered into between the parties within ten days. Some disagreements of a serious nature arose after this proposition was made and accepted, and it was withdrawn by Mr. Swenson, acting in behalf of the defendant, and the village board passed a resolution rescinding its acceptance of the same. In the meantime the village retained attorneys, and negotiations were thereafter carried on between the attorneys for the village and the power company, which did not result in bringing the parties together.

In October, 1908, the plaintiff commenced an action to enjoin the defendant from raising any head of water on its dam in such a way as to overflow or encroach upon the land of the plaintiff, and on November 24, 1908, an injunctional order was procured which enjoined the defendant during the pendency of the action from setting the waters of the Wisconsin river back so that they would overflow in any way or to any extent damage or interfere with the real estate owned by the plaintiff, or with the waterworks or electric light plant located on said real estate. At this time the work of building the dam and power plant and necessary equipment had been in progress for nearly two years. The dam was nearly completed and the power plant was well under way. When the injunction was served the defendant had nearly a million dollars invested in the improvement. It also appeared from the testimony that the money used was largely derived from the

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sale of bonds, that the bonds were guaranteed by the bonding house that had negotiated the same, and that the holders thereof were threatening to compel the bonding house to take back the bonds and refund the moneys paid therefor if there was any interruption in the progress of the work. It further appeared that it would be impossible to sell any other bonds while the injunction was in force, and that it was quite probable that the enterprise would end disastrously unless the injunction was set aside. It also appeared that in order to complete the plant it was necessary to spend in the neighborhood of a million dollars in addition to that already spent, and that the bonding house had advised the defendant to get rid of the injunction on the best terms it could, but to get rid of it in any event, if such a thing were possible. With this situation confronting it, the defendant submitted as its ultimatum the contract involved in this action, which bore date February 6, 1909, and was executed by both parties.

By this contract the defendant agreed to purchase at its own expense, and cause good title thereto in fee to be vested in the plaintiff, a tract of land of such size and in such locality at or in the vicinity of the village as might be mutually selected by the parties, and the defendant also agreed to construct at its own cost and expense all the wells and reservoirs and make all the necessary improvements to the land thus selected and purchased to derive therefrom an adequate supply of water for the use of the plaintiff and its inhabitants for all purposes, which water should equal in quantity and sanitary quality that derived from the present waterworks plant of the plaintiff. Defendant also agreed to make the necessary connection between the waterworks established upon such new locality and the present distribution system and water tower of the plaintiff, and that the improvements to be placed in such new location should constitute a complete electrically driven waterworks pumping plant ready for operation, with improvements, together with wells and reservoirs,

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the same to be made and constructed in accordance with the plans mutually agreed upon. It further provided that the quality of the water was to be determined by tests made by the state hygienic laboratory of Wisconsin. Defendant also agreed to make the necessary connections between its power plant and the new waterworks and electric light plant so as to carry current thereto. By this contract defendant further agreed to raise certain streets in the village and to keep the same in repair for a stipulated time, and to build a new concrete bridge over what was designated as Barney's Run, not less than nine feet above the ordinary stage of water; also to protect the abutment of the bridge at Superior street. It was further provided that all the old machinery, pumps, boilers, motors, switchboards, buildings, and other apparatus on the present waterworks plant, after the new one was in operation, should belong to the plaintiff and should be removed and sold by it. In addition to the foregoing the defendant agreed to pay to the plaintiff from the time of the completion of the dam and the commencement of the operation of its plant, but not later than January 1, 1910, and as long as said dam was maintained in the Wisconsin river, the sum of $3,500 for each and every year of the first five years and for each succeeding term of five years continuously thereafter the sum of $3,500 per year, together with a sum annually in addition thereto equal to $250 for each additional hundred persons or major portion thereof of the increase in the population of said village of *Kilbourn City* above 1,200, as shown by the next census, state or national, after the expiration of each five-year term, but in no event should the annual payments be less than $3,500 nor more than $4,500. It was further provided that said payments should be made semi-annually, beginning six months after the time of the commencement of the operation of the power plant, but not later than January 1, 1910.

On its part the plaintiff granted to the defendant the right to overflow the lands on which the old waterworks plant was

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situated, and it was further agreed in the contract that the defendant should furnish and the plaintiff should take from the power plant of the defendant, at current legal and reasonable rates, sufficient power to operate the waterworks pumping plant, and also a sufficient amount of electric current for supplying the plaintiff and its inhabitants with such light, heat, and power as may be obtained from an ordinary fixture.

The power plant was completed on August 6, 1909, and the first semi-annual payment of $1,750 became due and payable under the contract on February 6, 1910, and this action was brought for the recovery of the same. The answer in substance set forth that the contract was unenforceable because void under the public utilities law and for other reasons. The defendant interposed a counterclaim, alleging that it furnished certain current to the plaintiff by virtue of the aforesaid contract, and that there was due it from plaintiff on account of the current so furnished the sum of $1,928.08.

The circuit court found in substance and effect that the real contract entered into between the parties was a contract for furnishing free power to the plaintiff, and that the provision in the contract whereby the defendant obligated itself to pay the amounts specified and whereby the plaintiff agreed to purchase and pay for power, were inserted therein as a subterfuge and for the purpose of avoiding the provisions of the public utilities law. The court as a conclusion of law held that the contract was void as against public policy and because it contravened the provisions of the law referred to, and denied plaintiff any relief on the cause of action set forth in the complaint. It also gave judgment to the defendant on its counterclaim for the amount demanded therein. From this judgment plaintiff appeals.

For the appellant there was a brief by *Cary, Upham & Black,* and oral argument by *W. E. Black.* They contended, *inter alia,* that the contract is plain and must speak for itself without the aid of extrinsic evidence. *Klueter v. Joseph*

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Schlitz B. Co. 143 Wis. 347, 128 N. W. 43; *Zohrlaut v. Mengelberg,* 144 Wis. 564, 124 N. W. 247, 128 N. W. 975. Evidence of oral conversations was not admissible to explain or give character to it. *Steele v. Schricker,* 55 Wis. 134, 12 N. W. 396; *Excelsior W. Co. v. Messinger,* 116 Wis. 549, 93 N. W. 459; *Loree v. Webster Mfg. Co.* 134 Wis. 173, 114 N. W. 449; *Hackley Nat. Bank v. Barry,* 139 Wis. 96, 120 N. W. 275. A lawful construction, being possible, should be adopted. *Irish v. Dean,* 39 Wis. 562; *Voechting v. Grau,* 55 Wis. 312, 13 N. W. 230; *Hicks P. Co. v. Wis. Cent. R. Co.* 138 Wis. 584, 120 N. W. 512. There was an adequate consideration for the annual payments. *Wood v. Boynton,* 64 Wis. 265, 25 N. W. 42; *Rust v. Fitzhugh,* 132 Wis. 549, 112 N. W. 508; 9 Cyc. 365. Defendant is estopped to deny the validity of the contract on the ground of *ultra vires. Madison v. Am. S. E. Co.* 118 Wis. 480, 95 N. W. 1097; *Ricketson v. Milwaukee,* 105 Wis. 591, 81 N. W. 864; *McElroy v. Minn. P. H. Co.* 96 Wis. 317, 71 N. W. 652; *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 94 N. W. 74; *John V. Farwell Co. v. Wolf,* 96 Wis. 10, 70 N. W. 289, 71 N. W. 109; *Emigh v. Earling,* 134 Wis. 565, 115 N. W. 128. Except as to paragraph "K," which was separable from the rest, the contract was not subject to the public utilities act. As against defendant's right to recover on its counterclaim, they cited *Strauss v. Am. Exp. Co.* 3 Wis. R. R. Comm. 556; *Kiel W. W. Co. v. C., M. & St. P. R. Co.* 3 Wis. R. R. Comm. 597; *Whittet v. C., M. & St. P. R. Co.* 4 Wis. R. R. Comm. 480; *Beaver Dam L. Co. v. C., St. P., M. & O. R. Co.* 2 Wis. R. R. Comm. 700; *George L. Munroe & Sons v. Mich. Cent. R. Co.* 17 Int. Comm. Comm. 27; *Tioga C. Co. v. C., R. I. & P. R. Co.* 18 Int. Comm. Comm. 414.

For the respondent there was a brief by *Jones & Schubring,* and oral argument by *B. W. Jones* and *E. J. B. Schubring.* They cited, among other authorities, *Melchoir v. McCarty,* 31 Wis. 252; *Pearson v. Kelly,* 122 Wis. 660, 100 N. W. 1064;

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Clarke v. Lincoln L. Co. 59 Wis. 655, 18 N. W. 492; *Cohn v. Heimbauch,* 86 Wis. 176, 56 N. W. 638; *Indianapolis, D. & S. R. Co. v. Ervin,* 118 Ill. 250, 8 N. E. 862; *Twentieth Century Co. v. Quilling,* 130 Wis. 318, 110 N. W. 174; *Lepley v. Andersen,* 142 Wis. 668, 125 N. W. 433; *Corbett v. Joannes,* 125 Wis. 370, 104 N. W. 69; *U. S. v. C. & A. R. Co.* 148 Fed. 646, 156 Fed. 558; *U. S. v. C., I. & L. R. Co.* 163 Fed. 114; *Wis. Cent. R. Co. v. U. S.* 169 Fed. 76; *U. S. ex rel. Pitcairn C. Co. v. B. & O. R. Co.* 165 Fed. 113; *Wight v. U. S.* 167 U. S. 512, 17 Sup. Ct. 822; *Armour P. Co. v. U. S.* 209 U. S. 56, 28 Sup. Ct. 428; *New York, N. H. & H. R. Co. v. Interstate Comm. Comm.* 200 U. S. 361, 26 Sup. Ct. 272; *Union Pac. R. Co. v. Goodridge,* 149 U. S. 680, 13 Sup. Ct. 970; *State v. Union Pac. R. Co.* 87 Neb. 29, 126 N. W. 859; *Louisville & N. R. Co. v. Mottley,* 219 U. S. 467, 31 Sup. Ct. 265; *Hicks P. Co. v. Wis. Cent. R. Co.* 138 Wis. 584, 120 N. W. 512; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530. They also contended that, the contract being void, defendant was entitled to recover upon its counterclaim on *quantum meruit,* citing *Cohen v. Stein,* 61 Wis. 508, 21 N. W. 514; *Salb v. Campbell,* 65 Wis. 405, 27 N. W. 45; *Wojahn v. Nat. Union Bank,* 144 Wis. 646, 129 N. W. 1068; *Chase v. Hinkley,* 126 Wis. 75, 105 N. W. 230; *Koch v. Williams,* 82 Wis. 186, 52 N. W. 257; *Draheim v. Evison,* 112 Wis. 27, 87 N. W. 795; *Miller v. Des Moines,* 143 Iowa, 409, 122 N. W. 226; *Concordia v. Hagaman,* 1 Kan. App. 35, 41 Pac. 133; *Call P. Co. v. Lincoln,* 29 Neb. 149, 45 N. W. 245; *Nicholasville W. Co. v. Nicholasville,* 18 Ky. Law Rep. 592, 36 S. W. 549, 38 S. W. 430; *Ford v. Cartersville,* 84 Ga. 213, 10 S. E. 732.

BARNES, J. The contention of the appellant most elaborately argued was that the evidence failed to support the findings of fact to the effect that the provisions of the contract by which the plaintiff agreed to buy power at legal rates and

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the defendant agreed to pay the plaintiff a sum of not less than $3,500 nor more than $4,500 per year, depending on increase of population, were inserted in the contract to enable the plaintiff to obtain free power contrary to law and were adopted as a subterfuge to cover up the real purpose of enabling the plaintiff to obtain free power, and that the contract in fact was an agreement for free power to the extent of the sum agreed to be paid by defendant.

The evidence is ample to sustain these findings. A general outline of the negotiations between the parties is given in the statement of facts. It would not serve any useful purpose to recite the evidence in detail. From the beginning of the negotiations the plaintiff insisted on exemption from payment for such current as it might use. Strictly speaking, the earlier negotiations did not contemplate that the power should be free, in the sense that no consideration was to be paid for it, because the village was to meet the expenses of building a new plant. But the dominant idea seems to have been that it wished to avoid the payment of the usual compensation for the power used. When it broadened out its demand its purpose was to avoid paying any actual consideration for current. It demanded that a new site and a fully equipped plant be furnished it at least as good as the old one, and that it be put in running order without any expense to the village, and it wanted free power besides. The question of the competency of the parties to contract for free power seems to have arisen as early as October 17, 1908. The minutes of a meeting of the village board held on that day show that an inquiry was made by the president of the board of Mr. Upham, one of the attorneys for the village, whether in a settlement between the village and the power company the use of free power on the part of the village could be legally accepted and safeguarded, and that Mr. Upham gave as his opinion that it could. The minutes of the board under date of November 16, 1908, show that at the meeting of the board held on that date

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"Mr. Upham stated that as the law would prohibit the accepting of free power, the company would have to pay so much rental and the village pay for the power used. The counsel to arrange this matter." Mr. Swenson, president of the power company, testified, without contradiction, that it was agreed between the attorneys that free power was illegal and therefore the rental was provided to take its place, and that such a provision was supposed "to be just a good equivalent to what free power would amount to; in other words, we considered it an offset." He further testified that the amount of power necessary for use would increase with the increase in population and that the increase in rental provided for was intended to take care of that contingency. It also appears that the amount of rental provided for in the contract was about as nearly equal to the value of the power furnished as it was practicable to estimate in advance. The value of the power supplied from November 22, 1909, to July 1, 1910, was $1,928.08, or an average of $265.36 per month, which would make $3,183.96 per year, as against $3,500 rental which defendant agreed to pay plaintiff. This period took in the winter months, when undoubtedly less pumping was done than in the summer. The average monthly value of the current furnished for the four months from December 1 to March 31 was $218.62, and of the three succeeding months $330.16. This might be the result of a coincidence merely, but it is somewhat suggestive of the fact that the parties made a pretty close estimate of what the current consumed would cost and accordingly fixed the rental which the defendant was obliged to pay. There are other circumstances to support the conclusions arrived at by the circuit judge, but enough has been said to demonstrate that there is plenty of evidence to sustain the findings. Indeed, it would be difficult to draw any different inference from the established facts.

Was the court right in concluding as a matter of law that

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the contract was void because contrary to the provisions of our public utilities act, ch. 499, Laws of 1907? The defendant is a public utility and subject to that law, which was in force when the contract was made. Such law contains the following provisions:

Sec. 1797*m*—33. "It shall be unlawful for any public utility to charge, demand, collect or receive a greater or less compensation for any service performed by it within the state or for any service in connection therewith than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, *or to demand, collect or receive any rate, toll or charge not specified in such schedule.* The rates, tolls and charges named therein shall be the lawful rates, tolls and charges until the same are changed as provided in this act."

Sec. 1797*m*—89. "If any public utility . . . shall, directly or indirectly, by any device whatsoever or otherwise, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it in or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power . . . than that prescribed in the published schedules or tariffs . . . , than it charges, demands, collects or receives from any other person, firm or corporation for a like and contemporaneous service, such public utility shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful."

Sec. 1797*m*—91. "If any public utility make or give any undue or unreasonable preference or advantage to any particular person, firm or corporation . . . such public utility shall be deemed guilty of unjust discrimination which is hereby prohibited and declared unlawful."

Sec. 1797*m*—92. "It shall be unlawful for any person, firm or corporation knowingly to solicit, accept or receive any rebate, concession or discrimination in respect to any service in or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power . . . or for any service in connection therewith whereby any such service shall, by any device whatsoever, or otherwise, be rendered free,

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or at less rate than that named in the published schedules and tariffs in force as provided herein, or whereby any service or advantage is received other than is herein specified."

It could hardly be claimed under these sections of the public utilities law that a utility could by resorting to any device or subterfuge make a valid agreement with a consumer to furnish the latter with free current to the amount of $3,500 per year, and the appellant does not so claim. Some of the main purposes of this law were to compel public-service corporations to file their rates so that they would be open to public inspection, to make reasonable rates of charge, and to make one consumer pay the same as another where the service was furnished under substantially similar conditions. To accomplish these results, the language used is as broad and comprehensive as it could well be made. Individual cases may arise where the legislature might possibly have made an exception had the concrete case been in mind when the act was passed. But the courts cannot write these exceptions into the law. We must enforce it as we find it. The village of *Kilbourn* is one of the patrons of the defendant that is entitled to receive the same consideration in the matter of rates of charge that any other patron is entitled to receive; no less, no more. By taking advantage of a situation where it was able to force the defendant into making an unlawful contract, it can no more profit thereby than could any other purchaser of current from the defendant. It is in the same situation that any private riparian owner would be who thought he had an opportunity to drive a hard bargain.

Counsel for appellant argue that the provisions of law referred to have no application to the case, because the defendant's plant was not completed when the contract was made and the defendant was not then a public utility, and that it is only contracts between public utilities and the public that are prohibited. We cannot adopt this view. If it is correct, then any projected railroad could, at any time before the road

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actually commenced to serve the public, enter into perpetual contracts whereby certain shippers were favored. Any new telephone or electric light or water company could make all kinds of discriminating contracts before they actually began to serve the public. It is the duty of any new utility to make its schedule of rates and file it with the railroad commission at or before the time it commences to do business. Sec. 1797*m*—33. The matter of regulating rates of charge by public-service corporations and preventing discriminations is a governmental function and one over which the legislative branch of the government has a right to legislate within constitutional lines, and any contract which runs counter to a valid law in this regard, and that was not made under direct legislative authority, becomes superseded thereby, regardless of whether it is made before or after the law is enacted. This subject was fully considered in *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925. Of course the defendant had the power to contract to buy and the plaintiff the power to contract to sell the right to overflow the land of the latter, and they had the right to agree on the compensation to be paid, but they did not have the right to agree that full compensation should be made, and that in addition thereto the plaintiff should receive annually from $3,500 to $4,500 worth of free power. All subterfuges whereby one consumer is called upon to pay a greater or a lesser rate than that prescribed in the published schedule of charges, or whereby one consumer obtains a preference or advantage over another, are condemned. The scope, effect, and purpose of the law is considered at length in *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530, and it is unnecessary to elaborate or repeat what is there said. The matter of giving concessions in rates in settlement of a claim for unliquidated damages was considered in *Union Pac. R. Co. v. Goodridge,* 149 U. S. 680, 13 Sup. Ct. 970, and it was held that such a contract was in violation of the interstate commerce act. Other

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cases holding that parties dealing with public-service corporations must pay the regular schedule of rates for the service performed and that these rates cannot be departed from by making a contract which recites a consideration for the departure, are *Louisville & N. R. Co. v. Mottley,* 219 U. S. 467, 476, 31 Sup. Ct. 265; *Wight v. U. S.* 167 U. S. 512, 17 Sup. Ct. 822; *U. S. v. C. & A. R. Co.* 148 Fed. 646; *U. S. v. C., I. & L. R. Co.* 163 Fed. 114; *U. S. v. B. & O. R. Co.* 165 Fed. 113; *Interstate Comm. Comm. v. Reichmann,* 145 Fed. 235; *Armour P. Co. v. U. S.* 209 U. S. 56, 28 Sup. Ct. 428. Through a rigid enforcement of our laws, state and national, favoritism to the few by public utilities in the matter of rates has been very largely done away with, and the courts should be sure they are right before placing an interpretation on statutes dealing with rates of charge which would encourage a return to the old order of things.

Heretofore it has been said that the court should treat this contract as it would a like contract made between the defendant and a private riparian owner. Plaintiff does not concede this to be true, because it argues that there was no right of condemnation against the village. The defendant had the right to condemn the property owned by the village. The right to condemn property devoted to one public use for a different use exists (1) where such right is expressly given by statute; (2) where it arises by necessary implication from the powers and privileges granted; and (3) where the privileges granted cannot be beneficially exercised without the taking of the property already devoted to a public use. *In re Milwaukee Southern R. Co.* 124 Wis. 490, 501, 102 N. W. 401. It is apparent that the privileges granted by ch. 462, Laws of 1901, could not be beneficially exercised without encroaching upon the property of the plaintiff, and the power to raise a dam to a specified height and to flood such lands as would be overflowed thereby carried by implication the right to take the lands so flooded. This situation deprived the plaintiff of

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the strategic advantage of being able to prevent any occupation of its property against its will and of being able to retain the use of it unless it could obtain whatever price it saw fit to demand as compensation therefor.

Some reference has heretofore been made to the parol evidence given by Mr. Swenson. The appellant urges that this evidence was incompetent because it tended to vary the terms of a written contract. If the testimony of Mr. Swenson were excluded from consideration, there is plenty of competent evidence to sustain the finding of the trial court. But we do not think the evidence was incompetent where the issue was whether a contract apparently valid on its face was in fact made in contravention of a statute of the state and for the purpose of evading such statute in fact though not in form. *Lepley v. Andersen,* 142 Wis. 668, 125 N. W. 433; *Twentieth Century Co. v. Quilling,* 130 Wis. 318, 325, 110 N. W. 174; *Corbett v. Joannes,* 125 Wis. 370, 104 N. W. 69.

Appellant contends that the contract has been executed on its part and that defendant has received the benefit thereof and that it is estopped from asserting its invalidity, even though it was *ultra vires* when made. In support of this proposition the following cases are cited: *Madison v. Am. S. E. Co.* 118 Wis. 480, 95 N. W. 1097; *Ricketson v. Milwaukee,* 105 Wis. 591, 81 N. W. 864; *McElroy v. Minn. P. H. Co.* 96 Wis. 317, 71 N. W. 652; *John V. Farwell Co. v. Wolf,* 96 Wis. 10, 70 N. W. 289, 71 N. W. 109; *Lewis v. Am. S. & L. Asso.* 98 Wis. 203, 73 N. W. 793; *Bigelow v. C., B. & N. R. Co.* 104 Wis. 109, 80 N. W. 95; *Interior W. Co. v. Prasser,* 108 Wis. 557, 84 N. W. 833; *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 94 N. W. 74; *Emigh v. Earling,* 134 Wis. 565, 115 N. W. 128.

The rule invoked has no application to a contract made in violation of a statute and that is therefore in contravention of the lawfully declared public policy of the state. In such a case the party who has not performed and who is sued for the

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breach of his contract can avail himself of its illegality. *Clarke v. Lincoln L. Co.* 59 Wis. 655, 18 N. W. 492; *Cohn v. Heimbauch,* 86 Wis. 176, 180, 56 N. W. 638; *Pearson v. Kelly,* 122 Wis. 660, 100 N. W. 1064; *Sentinel Co. v. A. D. Meiselbach M. W. Co.* 144 Wis. 224, 128 N. W. 861; *Menominee River B. Co. v. Augustus Spies L. & C. Co.* 147 Wis. 559, 132 N. W. 1118.

The defendant did not file its schedule of rates with the railroad commission until July 20, 1910. It counterclaimed for the reasonable value of the current furnished plaintiff up to June 27, 1910. The appellant contends that no recovery should be allowed because of failure of defendant to seasonably file its schedule of rates. The circuit court held that the defendant was entitled to recover *quantum meruit* for the service rendered and awarded judgment in favor of the defendant for $1,928.08 for such service. The public utilities law contains the following provisions in addition to those already referred to:

Sec. 1797*m*—27. "Every public utility shall file with the commission within a time to be fixed by the commission, schedules which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are in force at the time for any service performed by it within the state, or for any service in connection therewith or performed by any public utility controlled or operated by it. The rates, tolls and charges shown on such schedules shall not exceed the rates, tolls and charges in force April 1, 1907."

Sec. 1797*m*—105, subd. 2. "Every public utility in this state shall, within thirty days after the passage and publication of this act, file in the office of the commission, copies of all schedules of rates and charges including joint rates, in force on the first day of April, 1907, and all rates in force at any time subsequent to said date."

Sec. 1797*m*—31. "No change shall thereafter be made in any schedule, including schedules of joint rates, except upon ten days' notice to the commission, and all such changes shall be plainly indicated upon existing schedules, or by filing new schedules in lieu thereof ten days prior to the time the same are to take effect."

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Under these provisions utilities that were in operation at the time the act was passed were required to file their schedule of rates not later than thirty days after its publication. As to a public utility coming into existence after the law was passed, we think the law clearly contemplates that schedules of rates shall be fixed for the services which it proposes to render, before the services are performed, and that the schedule so fixed shall be immediately filed with the railroad commission.

Sec. 1797*m*—33 makes it unlawful for a public utility *"to demand, collect or receive any rate, toll or charge not specified in"* the schedule of rates required to be filed. We are not very much impressed with the argument that this provision has reference only to such utilities as file their schedule of rates as required by law. We think the legislature has in effect said to public utilities, you must file your schedule of rates, you must charge what the schedule provides, and you may not charge anything unless you comply with the law. There is some force in the claim that this construction permits discrimination, one of the things that the statute was designed to prevent. While public-service corporations sometimes indulge in discriminations, their generosity seldom goes so far as to serve customers for nothing, and the legislature may well have thought that the best way to secure compliance with the law in the matter of filing schedules was to prohibit the recovery of compensation until such schedules were filed. In case there should be any disposition to take advantage of this requirement of the law, in order to discriminate between consumers, sec. 1797*m*—95 provides a penalty of not less than $100 nor more than $1,000 for each violation of the law. Taking the ordinary and obvious meaning of the language used, it prohibits a recovery for any service except as such service is covered by rates filed with the railroad commission. We cannot read out of the act any different intention on the part of the legislature.

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By the Court.—The judgment appealed from is modified by striking therefrom the provision that the defendant recover of the plaintiff on its counterclaim the sum of $1,928.08 with interest thereon from June 27, 1910. In all other respects the judgment is affirmed. Costs in this court are awarded against the respondent.

MARSHALL and KERWIN, JJ., took no part.

PLATTETER, Respondent, vs. PAULSON-ELLINGSON LUMBER COMPANY, Appellant.

March 16—April 3, 1912.

Master and servant: Personal injury: Complaint: Sufficiency: Appeal: Order overruling demurrer: Exception not necessary: Waiver of rights by answering.

1. In an action for personal injuries to a servant, the complaint, liberally construed, is *held* sufficiently to show that skids upon which plaintiff was piling logs for defendant were insufficient and defective; that defendant failed in its duty to furnish reasonably safe skids suitable for the purpose for which they were to be used; and that plaintiff was not necessarily chargeable with knowledge of their defective and dangerous condition.
2. An order overruling a demurrer to the complaint can be reviewed on appeal although not excepted to.
3. A defendant does not waive his rights on an appeal from an order overruling his demurrer to the complaint by putting in an answer after the appeal is taken.

APPEAL from an order of the circuit court for Rusk county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

The appeal is from an order overruling a general demurrer to the complaint.

For the appellant there were briefs by *Thomas & Carow,* and oral argument by *J. W. Carow.*

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For the respondent there was a brief by *W. H. & T. F. Frawley,* and oral argument by *T. F. Frawley.*

SIEBECKER, J. This is an action to recover damages for personal injuries received by the plaintiff while in the employ of the defendant.

The complaint alleges that the plaintiff, while engaged with other employees of the defendant in logging operations, was ordered to pile logs on skidways, and that while using skids furnished by the defendant one of the skids broke, allowing the log which was being raised to fall upon plaintiff and break his leg.

Negligence is alleged in the complaint as follows:

"That the failure of the said defendant to furnish the said plaintiff reasonably safe tools, implements, appliances, and instrumentalities, and the negligence of said defendant in ordering and requiring the said plaintiff to work by and with the tools, implements, instrumentalities, and appliances so furnished, was negligence for the reason that the skids so furnished by the said defendant to said plaintiff were insufficient in size, old, rotten, brittle, and likely to break, and that the same could not be safely used for the work so required of the said plaintiff by the said defendant.

"That the said defendant in failing to test, examine, and inspect the tools, implements, instrumentalities, and appliances was negligent for the reason that the said tools, implements, instrumentalities, and appliances demanded careful, close, and constant examination and inspection to determine the sufficiency and safety of said appliances so used by the said defendant in its said logging operations."

The appellant contends that the complaint fails to state a cause of action because it appears upon the face thereof that the defendant was not negligent in the respects alleged. The allegations must be liberally construed in favor of the plaintiff. Considering them from this viewpoint, it is obvious that the facts stated charge the defendant with furnishing skids that were insufficient in size and strength for the use for which

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they were intended, and that this rendered them unsafe and dangerous to the plaintiff in the course of his employment. This charges the defendant with a breach of duty in that in the conduct of its business it failed to furnish reasonably safe appliances and thereby was guilty of a want of ordinary care toward the plaintiff.

It is argued that the facts alleged show that the defects in the skids were so obvious that the plaintiff must be presumed to have known that they were unsafe and dangerous, and hence that he is precluded from asserting that he continued in the defendant's employ without knowledge of the danger. We do not find that this implication is justified by the allegations of the complaint. It is manifest from the facts alleged that the evidence may disclose that the plaintiff was wholly ignorant of the alleged dangerous and defective condition of the skids. Under the state of facts alleged, it may be said that the skids were insufficient and defective, that the defendant failed in its duty to furnish reasonably safe ones suitable for the purpose for which they were to be used, and that the plaintiff was not necessarily chargeable with knowledge of their defective and dangerous condition. These allegations of the complaint constitute a cause of action for negligence. These conclusions also negative the contention that the facts alleged do not charge defendant with a want of care through failure to properly inspect the skids. Further comment is not required.

There is no merit in the suggestion that the order appealed from cannot be reviewed in this court for want of an exception appearing in the record. No such exception is required to review an error which appears on the face of the record without a bill of exceptions.

Nor did the defendant waive its rights on appeal from this order by putting in an answer after the appeal was taken. *Douglas Co. v. Walbridge,* 36 Wis. 643.

By the Court.—The order appealed from is affirmed.

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HAMMOND, Appellant, vs. JOHN H. KAISER LUMBER COMPANY, Respondent.

March 16—April 3, 1912.

Logs and logging: Contract: Construction: Extra compensation.

A logging contract provided that during a certain season plaintiff should cut, haul, and load on cars all the timber on certain lands; that defendant should furnish a continual service of fifteen cars each day as might be required by plaintiff, and in case of failure to deliver said cars plaintiff should deck all logs not loaded on cars at track; that when said logs were so decked plaintiff should be deemed to have fulfilled his contract the same as though they were loaded on cars; and that if it should be necessary, on account of defendant's failure to provide cars as aforesaid and the accumulation of a surplus of logs which must be decked, defendant should have the option either itself to load the logs so decked or to allow plaintiff to load them at the price of ninety cents per thousand feet. *Held*, (1) that defendant was under no obligation to furnish more than fifteen cars per day, even though that number was insufficient to take care of the logs as fast as plaintiff found it necessary to haul them in order to complete the contract during the season; and (2) that the obligation to pay plaintiff ninety cents per thousand feet for loading decked logs was confined to logs decked by reason of defendant's failure to furnish the specified service of fifteen cars per day, and therefore, that number of cars having been in fact furnished, plaintiff was not entitled to recover anything under the last mentioned provision of the contract for the extra work in loading logs which it had become necessary to deck by reason of the insufficiency of such stipulated service.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

This action was brought to recover balance due upon a contract for cutting, hauling, loading upon railroad cars, and decking logs during the season of 1907 and 1908. The complaint contained three causes of action. Recovery was had on the first and third and denied on the second. The second cause of action was based upon a claim to recover $1,184.83,

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being ninety cents per thousand feet for loading on cars 1,316,842 feet of logs which had been decked. The contract provided that the plaintiff, party of the first part, during the logging season of 1907 and 1908, should cut, haul, and properly load on railroad cars at or near Winter, Wisconsin, all of the timber on certain described lands, excepting such as might be condemned by the defendant, party of the second part, and specifying the kind and quality of logs. The contract further provided:

"Said party of the first part further agrees to cut, mark, haul, scale, and load on cars of the C., St. P., M. & O. Ry. Company, at or near the town of Winter, in Sawyer county, Wisconsin, during the logging season of 1907 and 1908, all of the saw-log timber from the within described land.

"And further agrees to load said logs in such manner that they may be safely and properly transported to Eau Claire by said railway company, provided suitable cars and suitable equipment is furnished by the party of the second part; and to load not less than 5,000 feet, board measure, on each car, on an average, and not to load an amount, the weight of which will exceed the marked capacity of each of said cars.

"The said party of the second part further agrees to furnish a continual service of fifteen cars each day, as may be required from time to time by the party of the first part, and in case of failure thereof to deliver said cars, party of the first part agrees to deck all logs not loaded on cars at track—hardwood separate from pine and hemlock, etc.—as aforesaid mentioned. When said logs are so decked, it is understood that party of the first part has fulfilled his contract, in the same particular as though said logs were loaded on cars, it being further understood that any logs so decked are to be landed in a convenient manner for loading on cars later. . . ."

"*Payments:* In consideration of the performance of all of the foregoing agreements on the part of the first named party, the second named party agrees as follows:

"1st. To pay for all logs cut, hauled, and loaded on cars or decked as aforesaid, the sum of nine dollars ($9) per thousand feet, board measure, according to the scale herein provided for.

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"2d. To pay the same in the manner following: Four dollars and fifty cents ($4.50) per thousand feet the first of each month as the logs are skidded, based upon the estimate of the amount thereof to be made by two (2) persons, one appointed by the party of the first part and one appointed by the party of the second part; four dollars and fifty cents ($4.50) per thousand feet the fifteenth (15th) of each month, as fast as said logs are loaded on cars or decked. . . ."

The foregoing are the provisions of the contract material on the questions involved upon this appeal. It is established without dispute that the fifteen cars were furnished by the defendant and loaded by the plaintiff as agreed, and in addition thereto during said logging season 1,316,842 feet of logs were cut, hauled, and decked, and that the fifteen cars a day were not sufficient to take care of all the logs covered by the contract as fast as they were hauled and as fast as it was necessary to haul them in order to complete the logging contract during the season, and that the service performed by the plaintiff in loading the decked logs was additional work over and above what he would have had to perform had it not been necessary, in the course of the logging operations, to have decked any logs.

The court found as a conclusion of law that the plaintiff was entitled to nothing for the extra work claimed under the ninety-cent provision of the contract for the loading out of the decked logs. Judgment was entered in favor of the plaintiff on the first and third causes of action and in favor of the defendant on the second cause of action, thereby denying the plaintiff any compensation for loading the decked logs. From this judgment plaintiff appealed.

Spencer Haven, for the appellant.

D. Buchanan, Jr., for the respondent.

KERWIN, J. The facts in this case are undisputed, and the only question for determination is whether under the contract and findings the plaintiff was entitled to recover ninety

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cents per thousand feet for loading on cars the logs decked during the logging season of 1907 and 1908. The defendant furnished the fifteen cars per day agreed to be furnished during the season and the plaintiff loaded from sleighs the cars furnished, and in addition to the logs so loaded decked 1,316,482 feet, and at the request of defendant afterwards loaded on cars the logs so decked, and claims in his second cause of action $1,184.83, being ninety cents per thousand for loading the decked logs. The plaintiff claims that, a quantity of logs in excess of fifteen cars per day having been hauled and decked, he was entitled to ninety cents per thousand for loading on cars such decked logs. On the part of the defendant it is insisted that the plaintiff could only recover ninety cents per thousand for loading such logs as were decked because of failure to furnish fifteen cars per day. The controversy turns upon the contract. The defendant bound itself to furnish only fifteen cars per day, and it seems clear that it was under no obligation to furnish more. *John O'Brien L. Co. v. Wilkinson,* 117 Wis. 468, 94 N. W. 337.

The next question which arises is whether the decking mentioned in the contract had reference to the decking in case of failure to furnish the fifteen cars or decking of logs hauled in excess of the fifteen cars. The contract, after providing time, place, quantity, and character of logs to be put in during the season, further provided that plaintiff should cut, mark, haul, scale, and load on cars of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, near Winter, in Sawyer county, Wisconsin, all the saw-log timber on the described land. And the plaintiff further agreed to load said logs in such manner that they might be safely transported to Eau Claire by the railroad company, provided suitable cars and equipments were furnished by the party of the second part. Then follows the provision set up in the statement of facts to the effect that the defendant agreed to furnish a continual service of fifteen cars each day, and in case of failure to deliver said cars the

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party of the first part agreed to deck all logs not loaded on cars at track, and that when said logs were so decked it was understood that the party of the first part had fulfilled his contract in the same particular as though said logs had been loaded on cars.

The contract, after providing as to manner of cutting, scaling, reporting, and inspecting and other details of operation, further provides for payment of $9 per thousand for all logs hauled and loaded on cars or decked "as aforesaid."

. . . "That in the event of it being necessary, on account of failure on the part of the party of the second part to provide cars as aforesaid for the party of the first part as the logs are hauled on sleighs for the purpose of loading them on cars, and there is a surplus of logs accumulated which has to be decked, it is at the option of the party of the second part whether they load said logs so decked in the spring themselves or allow said party of the first part to load said logs on cars at the price of ninety cents (90 c.) per thousand feet, and the party of the first part hereby agrees that he will so load said logs at above mentioned price of ninety cents per thousand feet in the event of his being instructed to do so by the party of the second part. Payment of same to be made at completion of the work."

It is the opinion of the court that the foregoing provision of the contract respecting the payment of ninety cents per thousand for loading on cars the decked logs has reference only to logs decked in case of failure to furnish the fifteen cars per day agreed to be furnished. The contract by its terms seems to confine the pay for loading decked logs to those decked in consequence of failure to furnish cars as agreed by defendant. The provision in the contract to furnish a continual service of fifteen cars per day as may be required limits the number to fifteen cars, and the promise to pay for decking is confined to logs decked in case of failure to furnish the cars agreed to be furnished. It being conceded that fifteen cars per day were furnished as agreed, the contract gave no right to charge

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for loading the decked logs in question. In face of the express agreement that the defendant was bound to furnish a continual service of fifteen cars a day as required, it cannot be said that it was under obligation to furnish other cars, and the pay for loading decked logs was confined by the terms of the contract to logs decked because of failure to furnish a continual service of fifteen cars per day. *Boyington v. Sweeney*, 77 Wis. 55, 45 N. W. 938, is relied upon by plaintiff. In that case it was found that defendant was bound under the agreement to furnish the cars and it failed to do so. Here the defendant furnished the cars agreed to be furnished by it, and the expense of loading decked logs was not caused by any failure on the part of the defendant to furnish cars.

The court is of opinion that plaintiff is not entitled to recover on the second cause of action, therefore the judgment is right.

By the Court.—The judgment is affirmed.

JOHNSON, Administrator, Appellant, vs. CITY OF EAU CLAIRE, Respondent.

SAME, Respondent, vs. SAME, Appellant.

March 16—April 3, 1912.

Highways: Bridges: What constitutes an insufficiency: Injury and consequent death: Causes of action: Joinder: Survival: Pleading: Damages: Executors and administrators: Statutes construed.

1. In an action to recover for injuries and consequent death caused by insufficiency of a bridge, a complaint which described the insufficiency as consisting of a three-inch plank nailed to the floor of said bridge diagonally across the bridge, so that when a team of horses was driven across the same the front wheels of the wagon would not strike the plank at the same time, is *held* sufficient on demurrer to admit evidence proper to be laid before the jury to establish an actionable case of insufficiency for want of repair.

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2. A cause of action for damages suffered by a decedent prior to his death as the result of a personal injury may properly be joined in one complaint with a cause of action under sec. 4255, Stats. (1898), for the death.
3. Under sec. 4253, Stats. (Laws of 1907, ch. 353), the right of action for personal injuries occasioned by negligence survives, but such cause of action does not exist where death is instantaneous, a new right of action in such case being given by sec. 4255.
4. A complaint which attempts to state a cause of action in favor of the administrator of the deceased person for the benefit of his estate should make it appear that there was an interval of suffering between the injury and the death.
5. The words "party injured," as used in sec. 4255, Stats. (1898), mean the party whose death is caused, not the relatives of the deceased.
6. The damages recoverable by the administrator under said sec. 4255 are entirely different from those which would have been recoverable by the injured person himself, but the fact that such person could, if death had not ensued, have maintained an action is still the test of the right of his administrator to recover the statutory damages measured by the pecuniary loss to relatives.
7. The amendment to sec. 1339, Stats. (1898), by ch. 305, Laws of 1899,—providing that no action founded on defects in or want of repair of a highway "shall be maintained by a husband on account of injuries received by the wife or by a parent on account of injuries received by a minor child,"—does not exempt the municipality from liability to the person injured, even though such person be a wife or minor child, but only excludes recovery by the husband or parent for loss of services; hence the right of action under sec. 4255 for the death of such person is not barred. [Whether such amendment diminishes in any degree the damages recoverable under sec. 4255, not determined.]

APPEALS from orders of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Reversed.*

For the plaintiff there were briefs by *W. H. & T. F. Frawley,* and oral argument by *T. F. Frawley.*

Arthur H. Shoemaker, for the defendant.

TIMLIN, J. The plaintiff as administrator of Orlow Johnson, deceased, sets forth a first cause of action by which he sought to recover from the city for personal injuries to his

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decedent resulting in death and caused by an alleged defect in a bridge in the public highway. In a second cause of action for the same death he sought to recover under the familiar "death act," being sec. 4255, Stats. (1898). This count set forth that the deceased left surviving him his father and mother, also brothers and sisters. A demurrer to the first cause of action was overruled and a demurrer to the second cause of action sustained. The defendant appealed from the first ruling and the plaintiff from the second.

1. A question affecting both counts of the complaint arises upon the contention of the defendant that the statute, sec. 1339, Stats. (1898), makes the city liable only for the insufficiency or want of repair of the highway or bridge and that the facts set forth fail to show such condition. The insufficiency or want of repair complained of "consisted of a three-inch plank which was nailed to the floor of said bridge and extended about three inches above the floor, and that said plank was nailed diagonally across the said bridge, so that when a team of horses are driven across the same the said front wheels of the wagon would not strike the said plank at the same time." We have the case of *Kawiecka v. Superior,* 136 Wis. 613, 118 N. W. 192, in which the insufficiency consisted of a repair covering of two-inch plank over part of a sidewalk, leaving at the junction of the old and the repaired portion a raise of two inches corresponding to the thickness of the new overlaid planking, and in which this defect was considered "too trifling and inconsequential." Also *Burroughs v. Milwaukee,* 110 Wis. 478, 86 N. W. 159, in which a depression of one and one-half inches was considered not an actionable insufficiency. Also *Kleiner v. Madison,* 104 Wis. 339, 80 N. W. 453, in which an apron or covering of boards over a cement sidewalk which presented a raise of somewhat less than two inches was held not to be an actionable defect. On the other hand we have the case of *Stilling v. Thorp,* 54 Wis. 528, 11 N. W. 906, where one side of a bridge was from

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four to twelve inches lower than the other and the bridge was about two feet out of line with the road and the surface of the bridge covered with ice, and wherein it was held that there was evidence of insufficiency proper to be submitted to the jury. Also *Koenig v. Arcadia,* 75 Wis. 62, 43 N. W. 734, where there was in the planking of a bridge a hole or rut in the wagon track about three feet long, three and one-half inches wide, and three inches deep, caused by wearing through the upper layer of plank, and it was ruled that this presented evidence of insufficiency or want of repair sufficient to be submitted to a jury. In *Lynch v. Waldwick,* 123 Wis. 351, 101 N. W. 925, there was at the junction of the bridge planking and the ascending approach a piece of round timber or a log about four inches high, so laid that it formed an upright shoulder against which a vehicle would strike in coming up the grade and before it reached the planking. In that case this seems to have been considered to present evidence from which the jury might find an insufficiency or want of repair in the highway. In *Dralle v. Reedsburg,* 130 Wis. 347, 110 N. W. 210; *S. C.* 140 Wis. 319, 122 N. W. 771, there was a ledge of rock extending diagonally across the traveled track of the highway and from four to ten inches high, and this was held to be evidence of an actionable defect or insufficiency. Other cases might be cited, such as *Wanta v. Milwaukee E. R. & L. Co.* 148 Wis. 295, 134 N. W. 133. But the foregoing cases sufficiently present the contention of the parties on this point. Rules and instances are cited from the decisions made by courts in other states, but they are not helpful. In all such legal situations, where the statute uses general descriptive words to indicate the conditions of fact upon which the liability of the defendant must turn, there necessarily occur cases clearly within the general terms of the statute, cases clearly without the terms of the statute, and cases in which the statute is of doubtful applicability. It is exceedingly difficult to formulate any general rule that will be of practical

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aid in the cases last mentioned. It has sometimes been said that the defect or insufficiency would fall within one class or the other, depending upon whether reasonable men could or would differ in the inferences as to insufficiency to be drawn by them from the facts in evidence. This, however, does not help much; it is a sort of *argumentum ad hominem,* and amounts in the last analysis substantially to saying that those who differ with us are not reasonable men. There are, however, many situations arising in the law in which the courts must apply rules of law by a process of inclusion or exclusion of particular cases until from a great number of instances something approaching an uniform rule can be deduced. This is one of these cases. It will not do to rest the rule upon inches only. That is a factor in arriving at the result, but the other conditions and surrounding circumstances must also be considered. The fact that there was a single plank laid on the surface, presenting against the wheel a raise on one side and a drop on the other, and that it lay diagonally across the wheel track, causing first a lift on one side of the vehicle, then a drop on that side, and perhaps simultaneously with the last mentioned drop a lift on the other side, are matters to be considered in connection with the height of the raise over the level floor of the bridge. It seems to be a question of fact whether such plank would be dangerous to one in the exercise of ordinary care. A momentary relaxation or distraction of attention at the instant when the wheel of the vehicle encountered this plank might cause an occupant of the vehicle to be thrown from his seat. It might not be inconsistent with ordinary care for the driver to relax attention or to have his attention diverted for an instant under such circumstances. The highway must be reasonably safe to those exercising ordinary care. In a city where there is much traffic, many passing vehicles, and more things to distract the attention, a highway might be considered insufficient which would not be insufficient in a remote country district, upon the very fa-

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miliar rule of the law of negligence which apportions the care to the risk. While this is a very close case, we are inclined to believe that the conditions set forth in the pleadings were sufficient to admit evidence proper to be laid before the jury to establish an actionable case of insufficiency or want of repair.

2. In *Nemecek v. Filer & S. Co.* 126 Wis. 71, 105 N. W. 225, it was ruled that these causes of action may be properly joined in one complaint although the damages to be recovered under the first count are confined to those suffered by the deceased prior to his death and go into the general fund of the estate of the deceased, and those recovered under the second count are the pecuniary losses sustained by relatives of the deceased named in the act and must be paid over by the administrator to such relatives.

The first count of the complaint states that the decedent was violently thrown from his wagon to the floor of the bridge and the wagon passed over him, thereby causing his death. From this it would appear that the death followed the injury instantly, and the cause is presented in this court on that theory. If there was an interval of suffering between the injury and death the pleader should have made that appear. Under the law of this state as settled by sec. 4253, Stats. (1898), as amended by ch. 353, Laws of 1907, and the following cases, the right of action for personal injuries occasioned by negligence survives and may be prosecuted by the administrator of the deceased. The damages belong to the estate of the latter. But no right of action which rests solely upon causing death survives, because a new right of action is given for that, and it seems manifest that the legislature did not intend that the party in default should be twice liable for the same act. The new cause of action is to be prosecuted by the administrator, it is true, but for different beneficiaries. *Brown v. C. & N. W. R. Co.* 102 Wis. 137, 77 N. W. 748, 78 N. W. 771; *Nemecek v. Filer & S. Co.* 126 Wis. 71, 105 N.

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W. 225; *Lounsbury v. Davis,* 124 Wis. 432, 102 N. W. 941; *Quinn v. C., M. & St. P. R. Co.* 141 Wis. 497, 124 N. W. 653; *Hubbard v. C. & N. W. R. Co.* 104 Wis. 160, 80 N. W. 454; *McMillan v. Spider Lake S. M. & L. Co.* 115 Wis. 332, 91 N. W. 979. For the reason that the first count of the complaint attempts to state a cause of action in favor of the administrator for the estate of the decedent and for causing instant death solely, the demurrer was improperly overruled.

3. Sec. 4255, Stats. (1898), gives to the administrator, for the benefit of the relatives of the deceased therein mentioned, a new right of action, "whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof." The "party injured" here means the party whose death is caused, not the relatives of the deceased. If death had not ensued, Orlow Johnson would have been entitled under sec. 1339, Stats. (1898), as amended by ch. 305, Laws of 1899, to maintain an action and recover damages. These damages would include pain and suffering, permanent disability, disfigurement, moneys by him expended for medical attendance and nursing, loss of earning capacity after majority, and, in case of emancipation, loss of earning capacity during minority as well. The damages recoverable under the death statute are entirely different, but the fact that he could, if death had not ensued, have maintained an action and recovered the first mentioned damages is the test of the right of his administrator to recover the other class of damages measured by the pecuniary loss of the relative of deceased specified in the statute. It is true, as contended by the defendant, that the liability of a city to respond in damages for injuries caused by the insufficiency or want of repair of a bridge or highway rests only upon sec. 1339, Stats. (1898). By ch. 305, Laws of 1899, a proviso was by amendment inserted in this section in these words: "Provided, how-

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ever, that no action shall be maintained by a husband on account of injuries received by the wife, or by a parent on account of injuries received by a minor child." This proviso does not purport to exempt the municipality from liability to the person injured even when such person is a wife or a minor child. It recognizes such liability, but the husband or parent, as the case may be, has no right of action against the municipality for loss of services. It leaves the municipality liable under the preceding broad provisions of sec. 1339, *supra,* but only to the person actually injured. The second cause of action is therefore within the express terms of sec. 4255, above referred to. The pecuniary loss resulting from such death to the relatives of the deceased is not limited to the value of services during marriage or minority. Sec. 4256, Stats. (1898), as amended by ch. 164, Laws of 1907, provides that the amount recovered by the administrator shall belong and be paid over to the husband or widow of such deceased person if such relative survives; if not, then to the lineal descendants of such deceased person; if no lineal descendants, to the lineal ancestors; if none of these survive, to the brothers and sisters. At common law the husband was entitled to recover for loss of his wife's services and the parent for the loss of the services of a minor child on the theory that such services belonged to the surviving husband or parent. But the services of the husband do not belong to the widow nor the services of any person belong to his lineal descendants or to his brothers or sisters. So the death statute does not rest at all upon the common-law rule with reference to the right of the husband or father to the earnings of a wife or minor child. The relation which establishes such right in the husband or father is a condition of fact to be weighed by the jury in estimating damages, a factor in the result, but the damages do not rest exclusively upon that factor. The effect of ch. 305, Laws of 1899, is not to take away the right of action under sec. 4255, *supra,* from any person. Whether the proviso may

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be taken to diminish in any degree the damages recoverable under the death statute, it is not necessary to decide here. That it does not entirely bar recovery is apparent from the cases of *Tuteur v. C. & N. W. R. Co.* 77 Wis. 505, 46 N. W. 897; *Thompson v. Johnston Bros. Co.* 86 Wis. 576, 57 N. W. 298, and many other cases in this court, as well as from the words of the statute. The doubt suggested in *Dralle v. Reedsburg,* 140 Wis. 319, 122 N. W. 771, is whether this proviso, by taking away the right of recovery from the husband or parent, left the injured party in a position to recover this same element of damage which otherwise would belong to the husband or parent. It is not always a bar to recovery of damages that the person recovering owes a debt or duty concerning the sum recovered to another person, unless that other person has himself a right of action against the defendant. On the other hand, there are cases and instances to the contrary of this. This point has not been briefed or argued and it is not involved in the decision upon the demurrer, and therefore we leave it still a question for future consideration. It follows from what has been said that the demurrer to the second count of the complaint was incorrectly sustained.

By the Court.—On the plaintiff's appeal the order sustaining the demurrer to the second cause of action is reversed, and on the defendant's appeal the order overruling the demurrer to the first cause of action is reversed, and the cause remanded for further proceedings; without costs to either party, except that each party must pay half the clerk's fees.

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STATE vs. BOWEN and others.

March 16—April 3, 1912.

State boundaries: Main channel of stream: Change in channel: Fish and game laws: Jurisdiction.

1. **The jurisdiction of a state for the enforcement of its fish and game laws is co-extensive with, and limited by, the boundaries of the state, even though they consist of the thread of a navigable stream over whose waters the adjacent states have concurrent jurisdiction for other purposes.**
2. **Where the boundary line between states is declared to be the center line or thread or middle of the main channel of a stream separating them, the conditions then existing govern as to what channel is meant; and the *then* channel, except as it may be changed by erosion or accretion, will forever contain within it the declared boundary line, though not necessarily in the same place at all times.**
3. **Thus, no change in the boundary line between Wisconsin and Minnesota resulted from the construction of a dam which diverted the waters of the Mississippi river from the original main channel, east of a certain island, to a channel west thereof, although such western channel thereupon became the main channel and the only one navigable by steamboats.**

REPORTED from the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Question answered in the negative.*

The defendants were charged with a violation of the provisions of sec. 4560*d*, Stats., being ch. 525 of the Laws of 1909, in this, that they did on the 15th day of April, 1911, in the county of La Crosse and state of Wisconsin, unlawfully set, place, and use in an inland water of this state, to wit, in the Mississippi river, one certain net which was not then and there a landing net. The respective parties, by their attorneys, stipulated in open court that a jury be waived and that the case be tried and determined by the court. The judge found the facts as follows:

"That, on the day charged in the complaint, the defendants were fishing with a seine and trammel net in what is known

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as the east channel of the Mississippi river and west of the thread of the stream of said channel and at a point opposite to the county of La Crosse, Wisconsin, and east of Minnesota Island, contrary to the provisions of sec. 4560*d* of chapter 525, Laws of 1909.

"That said east channel lies between the Wisconsin main shore and what is known and designated upon the government maps as Minnesota Island.

"That, prior to 1876, said east channel of the Mississippi river was the one usually navigated by steamboats and was designated as the main channel of the Mississippi river by the surveyors who surveyed La Crosse county in 1854.

"That, about the year 1877, the Chicago, Milwaukee & St. Paul Railroad Company constructed a bridge from the main land in La Crosse county across said east channel and across said Minnesota Island and to the main Minnesota shore.

"That, prior to the construction of said bridge and in 1876, the said Chicago, Milwaukee & St. Paul Railroad Company constructed a dam across said east channel of the Mississippi river near the head of said Minnesota Island, thus diverting the said main channel of the river from the east side of Minnesota Island to the west side thereof in order to avoid constructing a drawbridge across said east channel and to throw and divert the channel of said river through the drawbridge constructed by it on the west side of said Minnesota Island.

"That, since the construction of said dam, the main navigable channel of the Mississippi river has been to the west of said Minnesota Island and, since said date, the said east channel has not been navigable for steamboats.

"That the construction of said dam diverting the said channel was with the consent of the War Department of the government of the United States.

"That the said Minnesota Island was surveyed by the government of the United States as a part of the state of Minnesota; and the taxes upon the same have been ever since assessed and collected by the authorities of the state of Minnesota."

As a conclusion of law, the judge found the defendants guilty as charged in the complaint; but, being of the opinion that a question of law arose on the trial which was so impor-

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tant as to require the decision of the supreme court thereon, and the defendants consenting thereto, he reported the following question for the decision of this court:

"Upon the foregoing findings of fact, has the circuit court of La Crosse county jurisdiction of this prosecution?"

For the state there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general, and oral argument by *Mr. Jackson.*

James Thompson, district attorney, for La Crosse county.

F. E. Withrow, for the defendants.

VINJE, J. In *Roberts v. Fullerton,* 117 Wis. 222, 93 N. W. 1111, it was held that the jurisdiction of a state for the enforcement of its fish and game laws is co-extensive with, and limited by, the boundaries of the state, even though they consist of the thread of a navigable stream over whose waters the adjacent states have concurrent jurisdiction for other purposes. The answer to the question reported, therefore, depends upon whether or not the boundary of the state of Wisconsin changed from the thread of the channel east of Minnesota Island to the thread of the channel west thereof by reason of the construction of the bridge and dam of the Chicago, Milwaukee & St. Paul Railroad Company about 1877, which diverted the waters into the west channel to such an extent that it afterwards became the main channel and the only one navigable by steamboats.

The district attorney of La Crosse county relies upon the cases of *Franzini v. Layland,* 120 Wis. 72, 97 N. W. 499, and *Iowa v. Illinois,* 147 U. S. 1, 13 Sup. Ct. 239, to sustain the contention that the boundary changed with the change of channel. Those cases establish the rule that *within the limits of the main channel* the boundary follows the "mid-channel" or thread of the stream as it changes from time to time owing to the gradual shifting of sand banks, or other causes. But they do not hold that the creation of a new and different

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main channel shifts the boundary from the old to the new. And such is not the law. For the purpose of determining the boundary between states where that is declared to be the center line, or thread, or middle of the main channel of a stream separating them, the conditions existing at the time of their creation govern as to what channel is meant. The *then* main channel, except as it may be changed by erosion or accretion, will forever contain within it the declared boundary line, though not necessarily in the same place at all times. *Nebraska v. Iowa,* 143 U. S. 359, 12 Sup. Ct. 396; *Missouri v. Nebraska,* 196 U. S. 23, 25 Sup. Ct. 155; *Washington v. Oregon,* 211 U. S. 127, 29 Sup. Ct. 47; *S. C.* 214 U. S. 205, 29 Sup. Ct. 631; 1 Farnham, Waters, § 7*f*, p. 40; Gould, Waters, § 159.

In *Iowa v. Nebraska* and *Missouri v. Nebraska, supra,* it is held that where a stream which is the boundary between two states from *any cause* suddenly abandons its old bed and seeks a new one, such change in the channel results in no change in the boundary. That remains in the center of the old bed or channel even though it may be dry. In each of those cases the change was caused by avulsion. In the present case the change was caused by the construction of a dam. It is obvious that any change wrought in the flow of the water by means of a dam cannot affect the question of state boundary any more than can such change produced by avulsion. It is only where the change takes place by the slow process of erosion or accretion that a change in boundary is effected. *Missouri v. Nebraska,* 196 U. S. 23, 25 Sup. Ct. 155. States and individuals alike are subject to the losses and gains of erosion and accretion, but neither can have the boundaries of his domain changed by avulsion or by the diversion of the water effected by human agencies. *New Orleans v. U. S.* 10 Pet. 662. Such being the law, a negative answer to the question reported for decision is required. It is due to the attorney general to add that, for reasons stated in his brief, he

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argues that no change in the state boundary was effected by the construction of the dam and consequent diversion of the water into the western channel.

By the Court.—The question reported is answered No.

HITE, Executor, Appellant, vs. KEENE, Respondent.

January 10—April 5, 1912.

Libel: Limitation of actions: Foreign laws: Expert testimony: Examination of witnesses: Hypothetical questions: Questions for jury: Stipulation for decision by court: Motions for directed verdict: Findings of fact, when essential: Appeal: Presumptions in case of general verdict: Exceptions by respondent.

1. In an action for libel which involved the meaning of the words "*fait précis*" in Swiss law (translated "precise fact" or "definite act"), expert testimony was admissible to show such meaning.
2. In such case it was not error to submit to experts in Swiss law certain letters containing the alleged libelous matter and to ask them whether such letters contained any averment of a "precise fact" or of a "definite act" within the meaning of the Swiss Penal Code, instead of interrogating them by hypothetical questions.
3. There is an inherent weakness in the testimony of legal experts, as to the interpretation to be placed on a foreign statute, which does not claim to be based on any decisions of the courts of the foreign country.
4. Such testimony, when competent, is not conclusive on court or jury, as the case may be, even though undisputed.
5. In this state it is held that a statute of limitations, when it has fully run, takes away the right as well as the remedy. [Whether or not there is any presumption that the law of a foreign country not subject to the constitutional limitations which form the basis of such holding, or of a country operating under the civil law, is the same as our own, not determined.]
6. The question of what a foreign law is, is always a question of

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fact; and when in a trial by jury a decision of that question must be made on conflicting oral testimony the question should be submitted to the jury unless the parties stipulate that it be decided by the court.

7. If such a stipulation be made, the trial court should make and file specific findings or conclusions of law upon the issues so to be determined by it, in order that the judgment may have a proper foundation. In this case, it not being clear that the trial court has found sufficient facts to warrant the entry of a judgment, the judgment entered is reversed and the cause remanded with directions to that court to make formal findings and enter judgment thereon unless of the opinion that a new trial should be granted.

8. The ordinary presumption, in case of a general verdict, that all questions of fact were resolved in favor of the successful party, cannot be indulged where the court directed the jury to find for the plaintiff and left to them only the assessment of the damages.

9. Sec. 3070, Stats. (1898), which permits the supreme court to consider exceptions taken by the respondent in support of a judgment, does not, in general, apply to actions tried by a jury or, where some of the issues in an action are determined by the court, to that part of the action which is tried by the jury.

10. A motion for a directed verdict by both parties is not equivalent to a stipulation that all the issues be disposed of by the court.

APPEAL from a judgment of the circuit court for Milwaukee county: CHESTER A. FOWLER, Judge. *Reversed.*

For the appellant there were briefs by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *J. G. Flanders* and *C. F. Fawsett.* They contended, *inter alia,* that the court was not bound by the opinion of experts as to the meaning and effect of foreign statutes, but these were questions of fact for the jury. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 309, 80 N. W. 644; *Head v. Hargrave,* 105 U. S. 45; *Finney v. Guy,* 189 U. S. 335, 343, 23 Sup. Ct. 558; *Laing v. Rigney,* 160 U. S. 531, 16 Sup. Ct. 366. The rule which prevails here, that statutes of limitation extinguish the right and not the remedy merely, is based on the constitutional doctrine of vested rights, and is contrary to the general rule. *Eingartner*

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v. Ill. S. Co. 103 Wis. 373, 79 N. W. 433; 22 Am. & Eng. Ency. of Law (2d ed.) 1385, 1386. The presumption that the law of another country is the same as our own has no application where the two have different systems. *St. Sure v. Lindsfelt,* 82 Wis. 346, 350, 351, 52 N. W. 308; *Thorn v. Weatherly,* 50 Ark. 237, 7 S. W. 33; *Bain v. Arnold,* 33 Mo. App. 631, 632; Lawson, Presumptive Ev. pp. 435–439; Jones, Ev. (2d ed.) § 84 (83). The period of limitation is governed by the law of the forum. *Campbell v. Holt,* 115 U. S. 620, 621, 6 Sup. Ct. 209; *Michigan Ins. Bank v. Eldred,* 130 U. S. 693, 696, 9 Sup. Ct. 690; 25 Cyc. 99.

Frank M. Hoyt, for the respondent, cited, among other authorities, *Title G. & T. Co. v. Trenton P. Co.* 56 N. J. Eq. 441, 38 Atl. 422; *Nelson v. Bridport,* 8 Beav. 527, 547; *Finney v. Guy,* 106 Wis. 256, 265, 266, 82 N. W. 595; *Hunt v. Whewell,* 122 Wis. 33, 99 N. W. 599; *International H. Co. v. McAdam,* 142 Wis. 114, 124 N. W. 1042; *Mexican Nat. R. Co. v. Jackson,* 89 Tex. 107, 33 S. W. 857, 31 L. R. A. 276; *St. Louis, I. M. & S. R. Co. v. McCormick,* 71 Tex. 660, 9 S. W. 540, 1 L. R. A. 804; *Ash v. B. & O. R. Co.* 72 Md. 144, 19 Atl. 643.

The following opinion was filed January 30, 1912:

BARNES, J. This is an action for libel, based on two letters written by the defendant, who was United States consul at Geneva, Switzerland, to one Smith, and in which numerous charges derogatory to the character of one Louis Hite were made. One of these letters was written in December, 1905, and the other in January, 1906. The contents of the letters were communicated to Hite in January, 1906, and the letters were delivered to him in April of the same year. This action was commenced in July, 1907. *Mr. Keene* was a resident of Milwaukee before his appointment to a consular office, and still claims that city as his place of legal residence. Mr. Hite was a citizen of Louisville, Kentucky, although at

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one time he took some steps toward becoming a citizen of Switzerland. The trial of the action resulted in a verdict in favor of plaintiff for $2,000 compensatory and $5,000 punitory damages. The defendant moved for judgment notwithstanding the verdict, and, in the alternative, if that motion were denied, for a new trial because of errors committed on the trial. The motion for judgment notwithstanding the verdict was granted, and from a judgment in defendant's favor this appeal is taken. Plaintiff died after the verdict was rendered, and the executor of his estate prosecutes this appeal.

The circuit court awarded the defendant judgment notwithstanding the verdict because in its opinion the action was barred by the Swiss statute of limitations applicable to such an action, and further because it was of the opinion that such statute operated to extinguish the plaintiff's right as well as his remedy. Appellant contends that the court erred on both propositions. If it erred on either, the judgment entered is erroneous.

Art. 303 of the Swiss Penal Code, translated from the French into English, reads as follows:

"Every allegation or imputation of a precise fact (*fait précis*) which injures the honor or respect of the person or set of men to whom the fact is charged, or which might expose him, either to criminal or correctional suits, or only to public hatred and contempt, is called defamation."

Art. 305 reads as follows: "Every contumelious expression, term of contempt or invective which does not comprise the charge of any precise fact is called abusive language."

Art. 312 reads as follows: "Every abuse which shall not have been uttered in public places or meetings, or which shall not comprise the charge of a definite fact, shall not cause anything but police penalties."

It is conceded that the Swiss statute of limitations applicable to art. 303 above quoted is three years, and that if the letters of the defendant imputed a "precise fact" which injured "the honor or respect of the person or set of men to whom the

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fact is charged, or which might expose him either to criminal or correctional suits, or only to public hatred and contempt," the statute of limitations had not run on the plaintiff's action at the time suit was brought. On the other hand, it is conceded that if the letters simply contained abusive language and did not charge a *"fait précis"* within the meaning of said art. 303, the action would be barred after one year under the law of the canton of Geneva.

The decision of the question depends on the meaning of the words *"fait précis,"* which have been interpreted as meaning "precise fact" or "definite act." If the words mean that an act must substantially be charged with the preciseness and definiteness that should be used in a criminal pleading, then it is apparent that *Keene* did not state a "precise fact" in his letters. If they mean that the term should be interpreted according to the ordinary meaning of the equivalent English words, then it might well be that "precise facts" or "definite acts" are charged in the letters in general terms. The situation was one where expert testimony as to what the words meant would be peculiarly helpful, because they might have a meaning to the Swiss or French lawyer very different from the one that would be conveyed to the American lawyer or layman by the English words into which they were translated. Three Swiss lawyers were sworn as experts. The *Keene* letters, which were written in English, were shown to and were read by them, and they were asked to state whether these letters contained any averment of a "precise fact" or of a "definite act," within the meaning of art. 303 of the Swiss Penal Code, and each answered in the negative. No evidence to the contrary was offered. The evidence, if competent, was not conclusive, because the court or jury might consider the Swiss law, and the letters, in connection with this evidence and reach an opposite conclusion. But if the court was right in admitting the evidence and in assuming that the question was one with which the jury were not concerned, its conclusion of fact

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thereon should not be disturbed by this court. The meaning of the act is not so clear that it can be said that considerable weight should not be accorded to the testimony of the experts, and we would be unable to say that the finding of the trial court was against the clear preponderance of the entire evidence.

The witnesses were asked to pass upon the ultimate question of fact to be decided by the court or jury, and it is said that this they may not do. It has been held that expert evidence which covers the ultimate facts to be decided by the jury and which is not based on a hypothetical case is not competent. *Baker v. Madison,* 62 Wis. 137, 22 N. W. 141, 583; *Maitland v. Gilbert P. Co.* 97 Wis. 476, 72 N. W. 1124; *Benson v. Superior Mfg. Co.* 147 Wis. 20, 132 N. W. 633. It has also been held that opinion evidence as to the ultimate fact may be given by experts in regard to matters of science, art, or skill in some particular calling, when based on a hypothetical question made up of facts that are not in dispute. *Maitland v. Gilbert P. Co., supra,* pp. 476, 484; *Green v. Ashland W. Co.* 101 Wis. 258, 77 N. W. 722; *Daly v. Milwaukee,* 103 Wis. 588, 79 N. W. 752; *Innes v. Milwaukee,* 103 Wis. 582, 79 N. W. 783. We do not understand that these cases have been overruled by what is said in *Lyon v. Grand Rapids,* 121 Wis. 609, 99 N. W. 311. In the case before us we can see no practical difference between asking the witnesses to read the letters and then say whether they contain a charge of a "precise fact," and calling for the same kind of an answer to a hypothetical question which embodied the facts stated in the letters. We must assume from the evidence that the witnesses were competent to read the English language as well as to understand it when spoken, and unless they could absorb its purport and meaning through the ear better than through the eye, no prejudice could result from pursuing the method of examination which was followed. Generally speaking, it would be advantageous to a witness to be permitted to

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examine the letters rather than to attempt to absorb their contents while a hypothetical question was being read to him. So we conclude that no error was committed in admitting the letters.

It may be remarked in passing that four members of the court are of the opinion that if the expert evidence had been rejected and the statute only was considered, the letters did not charge a *"fait précis."* Whether the court should have taken this question from the jury will be discussed later. There is no apparent conflict in the evidence itself, unless the parol evidence is in conflict with the obvious meaning of the statute. There was an inherent weakness in the parol testimony in that none of the witnesses claimed that any Swiss court had placed any interpretation on the meaning of the statute we are considering.

We get very little aid from reading the Swiss statute of limitation on the question whether the statute destroys the right as well as abolishes the remedy. The statute as translated reads as follows:

"An action for damages is lost by limitation after one year, dating from the day when the injured party had knowledge of the wrong and of the person who is the author of it, and in every case after ten years from that day the wrongful act was done.

"If, however, the injuries result from a punishable act subject by penal legislation to a limitation of longer duration, the same limitation applies to the civil action."

This court, as well as some others, has held that a statute of limitation takes away the right as well as the remedy. *Eingartner v. Ill. S. Co.* 103 Wis. 373, 376, 79 N. W. 433, and cases cited. American courts generally, and among them the supreme court of the United States, hold the contrary rule. Our decisions are apparently grounded on the proposition that a right acquired by such a statute is a vested property right and that it would violate the "due process" clause of the federal constitution to take away the right after it had accrued.

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According to the evidence there is no such provision in the Swiss constitution or in the constitution of the canton of Geneva. So it is argued by appellant that no presumption should be indulged in that the Swiss law is like our own, because it is shown that the reasoning on which our decisions are based is not applicable to a Swiss statute. It is further said that as to laws of foreign countries operating under the civil law, we cannot indulge in any presumption that the foreign law is the same as our own, and the weight of authority seems to be in favor of this contention. *St. Sure v. Lindsfelt,* 82 Wis. 346, 350, 52 N. W. 308; Lawson, Presumptive Ev. 435–439; Jones, Ev. (2d ed.) §§ 83, 84 (81–83); 5 Ency. of Ev. 819, and cases cited in note 36.

It is unnecessary to decide either of the two questions last suggested. The presumption, if one exists, is at best a mild one and not of any great value except where the proof is about evenly balanced or where there is no proof at all. The wording of the statute furnishes us practically no aid upon the subject. The three Swiss lawyers before referred to testified in reference to the matter, and if their evidence is entitled to credence it should settle the question one way or the other. One of them testified that the statute took away the remedy as well as the right. Some of his evidence would indicate that he had no very clear conception of the difference between right and remedy. The other two testified that the right was not taken away, but they too seemed to have no clear idea of what counsel were driving at. The depositions were taken on written interrogatories, and it is unfortunate that the witnesses could not have been examined orally. But in any event we have the asseveration of one witness that the right was gone as well as the remedy under the Swiss law, and of two who said that the contrary was true. Counsel for appellant argue that the court reached a wrong conclusion on this point, and we agree with counsel, because we think the court was wrong in reaching or in attempting to reach any conclu-

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sion upon it. The question of what a foreign law is, is always a question of fact. Where the only proof of a foreign law is some statute which has been offered in evidence, a number of courts hold that its construction is for the court. But where, as here, oral testimony is taken in which there is a sharp conflict and where the case must practically be decided upon this oral testimony, the authorities are well nigh harmonious to the effect that the disputed question of fact presents a jury question in a case triable by a jury, and not one that can be taken from the jury and be decided by the court. This question is not argued in the briefs of either counsel, but is directly involved in the case, and we do not see how we can escape passing upon it. Story, in his Conflict of Laws (7th ed.) § 638, states the rule as follows:

"The courts are therefore to decide what is the proper evidence of the laws of a foreign country; and, when evidence is given of those laws, the courts are to judge of their applicability, when proved, to the case in hand. . . . But when the evidence consists of parol testimony of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. . . . And when the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone."

The supreme court of Massachusetts, in *Kline v. Baker,* 99 Mass. 253, 254, said:

"As foreign laws can only be known so far as they are proved, no evidence of them can be admitted at the argument before this court, which was not offered at the trial or otherwise made part of the case reserved. . . . When the evidence consists of the parol testimony of experts as to the existence or prevailing construction of a statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony."

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The court in the above decision followed a former decision in *Holman v. King,* 7 Met. 384. And in *Ufford v. Spaulding,* 156 Mass. 65, 66, 30 N. E. 360, the court again says:

"It is a general rule, that laws of other states must be proved as facts, and ordinarily, in a trial by jury, the question must be left to the jury to decide as a fact what the law of another state is, if it becomes material to be determined."

To the same effect is *Ames v. McCamber,* 124 Mass. 85.

Without carrying this opinion to unnecessary length by indulging in repeated quotations, we call attention to the following additional authorities which hold that the evidence here offered presented a question of fact which the jury should have been permitted to pass upon: *State v. Looke,* 7 Oreg. 54; *De Sobry v. De Laistre,* 2 Har. & J. 191, 3 Am. Dec. 535; *Trasher v. Everhart,* 3 Gill & J. 234; *Charlotte v. Chouteau,* 25 Mo. 465, 475; *Ingraham v. Hart,* 11 Ohio, 255; *Dyer v. Smith,* 12 Conn. 384; *Moore v. Gwynn,* 5 Ired. (27 N. C.) 187; *Hooper v. Moore,* 50 N. C. 130, 134; *Francis v. Ocean Ins. Co.* 6 Cow. 404, 429; 5 Ency. of Ev. 382; *Mostyn v. Fabrigas,* 1 Cowp. 161, op. by Lord MANSFIELD.

There are a number of cases which hold that the matter of determining the qualifications of experts or other questions bearing on the competency of witnesses and evidence must be passed on by the court, and that where the evidence admitted consists entirely of written documents, statutes, or judicial opinions, the question of their construction and effect is for the court alone. *Church v. Hubbart,* 2 Cranch, 187; *Ennis v. Smith,* 14 How. 400; *Owen v. Doyle,* 15 Me. 147; *State v. Jackson,* 2 Dev. (13 N. C.) 563; *People v. Lambert,* 5 Mich. 349; *Bremer v. Freeman,* 10 Moore P. C. Cas. 306; *Di Sora v. Phillipps,* 10 H. L. Cas. 624; *Hooper v. Moore, supra.*

Our own statute, sec. 4139, provides that the existence and the tenor or effect of all foreign laws may be proved as facts by parol, but if it shall appear that the law in question is contained in a written statute or code, the courts may, in their

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discretion, reject any evidence of such law that is not accompanied by a copy thereof.

Where, as here, there is conflicting parol testimony as to what the effect of the Swiss limitation statute is, and where no satisfactory inference can be drawn from the statute itself, we have found no case which does not hold that the fact must be determined by the jury, except *Hall v. Costello,* 48 N. H. 176. A number of cases are cited by that court to sustain its decision, but they fail to do so; and one of them, *Francis v. Ocean Ins. Co., supra,* is directly to the contrary. All the authorities hold that a foreign law must be proved as any other fact in a case, and when that proof is made by oral testimony in reference to which there is a conflict, we see no reason why its weight and credibility should not be determined by the jury under proper instructions, like any other material fact. A majority of the court is of the opinion that there is no such preponderance of the evidence against the finding of the trial court on this question, if there is any such finding, that its conclusion should be set aside if the question were a proper one for it to decide. The question is treated by the circuit judge as though it were one of law instead of one of fact. The verdict was a general one in form, and ordinarily we would have to assume that all questions of fact had been resolved in favor of the successful party. That assumption cannot be indulged in here, because the court directed a verdict in plaintiff's favor and instructed the jury that a verdict must be returned for the plaintiff in some amount and that their only function in the case was to make an assessment of damages. So the jury was expressly prohibited from passing upon the question under discussion. It follows from what has been said that the trial court committed an error against the respondent in the first instance in directing a verdict against him, because it should have been left to the jury to say upon the testimony offered whether the Swiss statute of limitation extinguished the right as well as the remedy. It necessarily follows that

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the trial court committed error against the appellant when it ordered judgment for the defendant notwithstanding the verdict. In each instance the court assumed to decide what was clearly a jury question. Instead of entering judgment in defendant's favor the court should have granted a new trial. The judgment must therefore be reversed. As it is apparent that the plaintiff is not entitled to judgment on the verdict, the circuit court should order a new trial. Sec. 3071, Stats. (1898).

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to the circuit court to grant a new trial.

The respondent moved for a rehearing. The appellant moved that the mandate be modified so as to direct the circuit court to cause judgment to be entered upon the verdict.

The following opinion was filed April 5, 1912:

BARNES, J. The bill of exceptions in this case contained the following colloquy between counsel and the court:

"Mr. Hoyt: We might just as well offer these other depositions. They relate to the legal point. We offer the deposition of Mr. Privat.

Court: That is as to the law?

Mr. Hoyt: Yes.

Court: Mr. Fawsett and Mr. Flanders, now just a moment.

(The court and counsel thereupon consulted in an undertone out of the hearing of the reporter.)

Mr. Hoyt: It is stipulated that this question of the statute of limitations and the evidence is purely a matter of law to be decided by the court.

Court: Gentlemen of the Jury—Some matters are coming up now which are purely matters of law and you certainly would not be interested in it and there is no good reason why you should be kept here. You may be excused until tomorrow morning at half past 9. Please report at that time."

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This colloquy was not printed in the case, but it did contain the following:

"It is stipulated that the question of the statute of limitations and the evidence about to be offered in relation thereto were purely matters of law to be decided by the court."

No reference to the stipulation was made in the briefs or on the oral argument, and no assertion was made that the parties had agreed that some of the issues of fact should be tried by the court and the remaining issues only passed upon by the jury. We had before us only what the reporter heard. We do not regard that part of the colloquy as meaning anything more than that certain questions of law were involved in relation to the admission of the evidence contained in the depositions which defendant proposed to offer, and that, inasmuch as these questions would have to be decided by the court, the presence of the jury was unnecessary while they were being passed upon.

However, since the case was decided, counsel have filed a stipulation in this court, in which they recite that they agreed that "all questions whether of fact or law involved in such issue [that arising on the statutes of limitation which were pleaded] should be determined by the court," and we have concluded to treat the same as part of the record. The appellant moved to modify the mandate so as to order judgment on the verdict for the plaintiff. The respondent moved for a rehearing because he conceived that he was entitled to an affirmance of the judgment, under the stipulation, on the decision of the circuit judge, and further, because prejudicial error was committed against him on the trial which would entitle him to a new trial, and, inasmuch as the causes of action sued on did not survive, all right of action was lost.

The appellant's motion cannot be granted. We held in the former opinion that there was sufficient evidence in the record to sustain a finding by the trial court that the Swiss statute

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of limitations destroyed the right as well as the remedy, and we see no reason for receding from that position. The circuit court has not made any findings of fact favorable to the plaintiff on that point. The court submitted nothing to the jury except the assessment of damages. Under the stipulation, it may be that no other question should have been submitted. There is language in the charge which would indicate that at the time it was given the court was of the opinion that the plaintiff was not barred from recovery by the statute of limitations. There was nothing to preclude the court from changing its mind before the entry of judgment. By virtue of the stipulation the judgment was to be based on the verdict of the jury supplemented by the findings of fact by the court on the questions reserved from the jury and the conclusions of law drawn therefrom.

Whether the court has found sufficient facts to warrant the entry of a judgment against the plaintiff is far from being clear. Inasmuch as the issues of fact were parceled out between the court and the jury, the court should have made specific findings of fact on the material issues which it was agreed it should try. Instead, we have an opinion of the court covering fifteen pages of printed matter in which is discussed the various legal questions raised on the motions after verdict and incidentally some questions of fact. In that opinion the court definitely decides that he is satisfied from the evidence that the one-year statute of limitations was applicable to the case.

On the other question we have no finding of fact. The court discusses the evidence of the three Swiss lawyers and concludes: "I incline to think that the greater weight of testimony as a whole is to the effect that the Swiss statute extinguishes the claim itself." The court then very properly considers the statute itself and concludes that its wording, in a measure at least, supports the view that the right is extinguished thereby. The court then treats the question on the

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theory that the evidence does not satisfactorily show what the Swiss law on the point is, and proceeds to argue that the law of the forum should govern, and that applying that law the right was extinguished as well as the remedy. The questions whether the law of the forum should apply in any event, and what that law is, are legal ones. How far they influenced the court in reaching its ultimate conclusion we do not know. The question of what the foreign law was in the instant case was one of fact to be determined from a reading of the Swiss statute, from the evidence of the experts, and from any other competent evidence in the case. If this evidence was such that the court could not reach a conclusion thereon, then the court should have so found. The case might then have to be decided on certain presumptions, but the decision of the circuit judge thereon would carry no such weight as would his conclusion on a disputed question of fact.

We think on the whole the case should be sent back to the trial court to make formal findings of fact and conclusions of law on the issues submitted to it for determination. If these findings and conclusions entitle the defendant to judgment, he will have secured what he desires. If they are favorable to the plaintiff, the defendant is entitled to have his motion for a new trial considered and decided on the merits. It has been held that the statute (sec. 3070, Stats. 1898) which permits this court to consider exceptions taken by a respondent in support of a judgment applies only to actions tried by the court. *Hacker v. Horlemus,* 69 Wis. 280, 34 N. W. 125. There may be exceptions to this general rule, but this case does not fall within them. The exceptions here urged by respondent relate to the part of the action that was tried by jury. This court has never adopted the rule that a motion for a directed verdict by both parties is equivalent to a stipulation that all the issues therein be disposed of by the court, and has no disposition to do so now. We have not passed upon the question whether the right of action became extin-

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guished by the death of the former plaintiff. That issue is left open for litigation in the lower court in the event of a new trial being granted.

By the Court.—The former mandate is modified by directing the trial court to make findings of fact and conclusions of law as herein indicated and to enter judgment thereon, unless of the opinion that a new trial should be granted. The motion for a rehearing is denied. No costs are allowed on either motion.

LOWREY, Respondent, vs. FINKLESTON, imp., Appellant.
SAME, Appellant, vs. SAME, Respondent.

January 12—April 23, 1912.

Deeds: Condition subsequent: Breach: Re-entry by grantor: Equity: Remedies: Removal of cloud on title: Ejectment: Agreement for personal services: Deed construed: Recording: Constructive notice of condition: Mortgages: Accounting: Appeal: Remanding case for statement of account.

1. A grantor of land who has re-entered and is in actual possession thereof after breach of a condition subsequent may maintain an action in equity to set aside the conveyance as a cloud on his title, and need not sue in ejectment.
2. Where a conveyance and lease were made subject to the performance by the grantee and lessee of an agreement to make certain payments and render certain services, some of which were of a personal nature and founded in the close relations existing between the parties, his death in the lifetime of the grantor and prior to full performance of such personal services entitled the grantor to treat the condition as broken, and she was not bound to carry out the contract with his legal successors.
3. The words "heirs, executors, administrators, and assigns" in the *habendum* clause of the deed and lease would not alter the case, where no such words appear in the condition.
4. Where a substantial part of the agreement upon which a conveyance and lease are made is the performance of certain services to the grantor during her natural life, and the instruments provide that upon a failure of performance at any time the grantor

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may declare the same void and may enter upon and repossess the premises, the agreement will be treated in equity as a condition subsequent, and, if substantially broken through failure of the grantee to perform, the conveyance and lease will be set aside.

5. In such a case equity takes jurisdiction, not to forfeit a title, but to quiet a title already forfeited for breach of the condition.

6. Where a conveyance containing a condition subsequent is duly recorded, such record is constructive notice to a subsequent mortgagee of the premises, who can acquire no greater rights than the grantee; and the same is true of creditors of the grantee.

7. Where a grantee of land subject to an agreement constituting a condition subsequent, a substantial part of which was the rendition of personal services, mortgaged the land and thereafter died insolvent, and his administratrix and heirs surrendered the land to the grantor, the mortgagee was entitled in equity to an accounting and to have a lien upon the land for the excess, if any, of moneys paid and articles furnished by such grantee, over the rental value of the land, together with interest on the amount of such excess paid each year from the time of payment to the date of the judgment.

8. Under the facts and circumstances of this case, such mortgagee was also entitled to an equitable lien for the amount of the dividend she would have received had she filed her claim against the mortgagor's estate, she having declined to file such claim in the belief that her mortgage was valid.

9. The fact that the amounts expended by the grantee of the land were paid out in the performance of his agreement would not bar his estate from being allowed therefor in an equitable accounting, since by the grantee's death the grantor became entitled to a rescission and restoration to her former rights. *Morgan v. Loomis*, 78 Wis. 594, distinguished.

10. Upon appeal in such a case, this court, being unable to ascertain with accuracy from the record the amount of the excess of annual payments over the rental value, or the amount due upon the mortgage at the time of judgment, remands the case for a statement of the account by the trial court in accordance with the opinion of this court, to the end that, if necessary, additional testimony may be taken.

APPEALS from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed on plaintiff's appeal; reversed on defendant's appeal.*

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This is an action to set aside a deed and a lease of real estate executed September 11, 1900, by the plaintiff, a lady then nearly eighty years of age whose husband had died about one year before. The deed covered 180 acres and the lease 260. The conveyance was made to one Jones upon certain conditions named in the deed. Jones died about eight years after the conveyance, insolvent, having before his death executed a mortgage upon the 180 acres deeded to him to one Finkleston, who afterwards died and the mortgage was assigned to his widow. *Mary Finkleston,* the heirs at law of James Jones, and numerous of his creditors as well as his administratrix were made parties defendant. The defendant *Mary Finkleston* answered by admissions, denials, and special matter.

The court found substantially as follows: That on and prior to the 11th day of September, 1900, plaintiff was the owner of the lands in question and a resident of Iowa county, Wisconsin; that on the 11th day of September, 1900, plaintiff made and entered into an agreement in writing with one James L. Jones, by the terms of which plaintiff conveyed to Jones 180 acres and leased 260 acres during the natural life of the plaintiff, such conveyance and lease being in consideration of the payment of $500 in two semi-annual payments during the natural life of the plaintiff, and also the delivery to plaintiff during her natural life of certain vegetables, firewood, horse feed, and also the care of and hitching up and unhitching of a horse for the plaintiff, and payment of taxes assessed upon the land in question; and it is provided in such conveyance and lease that if the said Jones, second party, shall fail faithfully to keep all of the said covenants, conditions, and agreements, the instrument shall be utterly void and of no effect, and plaintiff, first party, shall have the right to declare it void and enter upon, use, enjoy, and own all of the lands covered by such conveyance and lease; that said agreement was executed in the presence of two subscribing witnesses, duly acknowledged and recorded in the office of the register of

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deeds for Iowa county on the 22d day of September, 1900; that said Jones entered into possession of the premises and remained in such possession until the 22d day of October, 1907, at which time he died; that thereafter letters of administration were duly granted to the defendant Laura E. Jones, widow of deceased, who duly qualified as such administratrix; that a large number of claims were filed and allowed against the estate of said Jones, deceased, and it became necessary to sell the real estate owned by said James L. Jones to apply upon such indebtedness; that said James L. Jones, deceased, left surviving him the defendant Laura E. Jones, his widow, and the following children, defendants in this action, to wit: Gwen Lloyd Jones, Maud Lloyd Jones, Scott Lloyd Jones, Charles Lloyd Jones, Rebecca Lloyd Jones, Esther Lloyd Jones, and Thomas Clark Lloyd Jones; that the summons and complaint were duly served upon all defendants and that none appeared except the answering defendants; that the defendants herein, except the widow and heirs of said James L. Jones and *Mary Finkleston,* are creditors of said Jones, whose several claims were filed and allowed by the county court on the 10th day of November, 1908; that said James L. Jones failed to render to plaintiff his personal service set forth in the agreement above referred to and was in arrears upon certain payments due thereunder at the time of his death; that at the time of the execution of this agreement plaintiff was nearly eighty years of age, living alone upon the farm in question; that her husband had died about a year previous and all of her grandchildren and children had left her; that James L. Jones had been an intimate friend of plaintiff all his life and had come to be regarded almost as a son, both by plaintiff and her husband; that plaintiff was anxious to make provision for her declining years, and to secure the care and attention of said Jones during that time, and to secure such care and attention, and in consideration of the love and affection which plaintiff had for said Jones, she and said Jones en-

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tered into the aforesaid agreement; that said Jones failed to make payments which fell due in October, 1907; that he did not furnish the vegetables agreed to be furnished; that he never took care of plaintiff's horse, did not keep her conveyance in order, and did not hitch up and unhitch her horse as agreed; that after the death of said Jones, his widow, Laura E. Jones, who was administratrix of his estate, attempted to carry out the provisions of the agreement, but in September, 1908, surrendered to plaintiff the copy of said agreement and notified plaintiff that it was impossible for her and her family to carry out the provisions of the contract, and that she as his widow and administratrix of his estate, and the heirs at law of said Jones, joined in such surrender and thereupon released and abandoned all claim to the land in question and have since made no attempt to perform the conditions of the agreement; that thereupon plaintiff entered into and took actual possession of all of said lands under the provisions of said deed and agreement and has since been in such possession, and whatever interest said Jones had under the deed reverted to plaintiff because of the breach of the conditions of the deed, the widow of Jones and heirs disclaiming any right or interest therein; that said James L. Jones and Laura E. Jones, as administratrix of his estate, occupied said premises eight years and paid to the plaintiff during that time under the agreement as rent $3,940; that Jones permanently improved the land by killing quack grass and grubbing to the amount of $300; that hay, oats, and corn were furnished for plaintiff's horse according to the agreement of the value of $600, also firewood worth about $160, and said Jones paid $864.78 taxes on the premises; that the fair rental value of the premises during the time occupied by Jones and his administratrix was $4,000; that said Jones should be credited upon a full accounting with $5,864.78 and should be charged with $4,000, reasonable rental value of this land; that on January 3, 1905,

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James L. Jones and wife executed to one D. J. Finkleston, husband of *Mary Finkleston,* defendant, a note for $5,000, secured by mortgage on the land deeded to Jones; that D. J. Finkleston died about the same time as James L. Jones and the defendant *Mary Finkleston* became the owner of said note and mortgage, no part of the principal of which has ever been paid and no interest since January 3, 1908, and there is now due on said mortgage and note to defendant *Mary Finkleston* $5,000 and interest; that said mortgage was duly recorded, but plaintiff had no knowledge of its existence until after the commencement of this action; that there is no proof that the moneys received by James L. Jones from the mortgage loan were used to any extent for the benefit of the plaintiff or to enable said Jones to continue to make payments to plaintiff; that the failure of the administratrix to comply with the terms of the agreement was not due to any collusion or agreement between said administratrix and plaintiff or between plaintiff and other persons; that the plaintiff always regarded the conditions of the deed as personal services to be rendered by James L. Jones and that she has never been willing to allow any one to come in and take his place in performing the same; that the material allegations of the complaint are proven and true, and that the material allegations of defendant's answer are not established by the proof.

As conclusions of law the court found that said agreement between plaintiff and James L. Jones should be canceled, set aside, and held for naught; that each defendant, with the exception of *Mary Finkleston,* be forever barred from asserting or having any right, title, claim, interest, or demand in or against said premises, and that the title and possession of plaintiff be declared legal and lawful; that defendant *Mary Finkleston* be adjudged to have an equitable lien upon the part of the premises described in her mortgage for the sum of $1,864.78, with interest at six per cent. since the commence-

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ment of this action, February 18, 1909, and that all other right, title, or claim which she has or may have against said premises be forever barred; that plaintiff shall pay the sheriff's and clerk's fees in this action; neither party to recover costs from the other.

Judgment was entered in accordance with the findings of fact and conclusions of law, from which the defendant *Mary Finkleston* appealed. The plaintiff also appealed from that part of the judgment granting relief to the defendant *Mary Finkleston.*

For the defendant *Mary Finkleston* there were briefs by *Grotophorst, Evans & Thomas,* and oral argument by *Evan A. Evans.*

For the plaintiff there was a brief signed by *Spensley-McIlhon & Priestley* and *C. F. Osborn,* and oral argument by *Mr. Osborn* and *Mr. T. M. Priestley.*

The following opinion was filed January 30, 1912:

KERWIN, J. The facts in this case, except in some minor detail, are covered substantially by the findings of fact set forth in the statement of the case. We shall first treat the appeal of the defendant *Mary Finkleston.* Counsel claims that the proper remedy of plaintiff was at law in ejectment and that she cannot maintain the present action in equity, relying upon *Mash v. Bloom,* 130 Wis. 366, 110 N. W. 203, 268. The plaintiff insists that this point was waived by defendant. But whether it was or not is of no consequence, because plaintiff was in possession when she commenced the action; therefore, upon well established principles, her action was properly grounded in equity to set aside the conveyance and lease for breach of condition subsequent and remove the cloud from plaintiff's title.

Defendant further contends that neither in an action at law nor in equity should the court have set aside the convey-

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ance, for the reason that the evidence does not warrant judgment in plaintiff's favor, because it is insisted (1) that the contract was fully carried out by James L. Jones during his lifetime; and (2) that it could have been carried out by the estate for the benefit of the estate. But on the first point the evidence and the findings of the court below as well are against the defendant. As to the second point, the condition subsequent being personal in its nature and being exclusively with James L. Jones, the plaintiff was not bound to carry out the contract with the successors of Jones, and moreover, after an attempt by the administratrix to carry out the terms of the agreement, she concluded she could not do so and voluntarily surrendered it. The conveyance was made on the faith of James L. Jones performing the conditions named in the contract, some of which were to render her personal services, and principally because of the close relation existing between her and Jones. Some argument is made by counsel for defendant to the effect that the terms of the condition upon its face show that it contemplated performance not alone by Jones, but "his heirs, executors, administrators, and assigns," therefore the contract was not considered a personal one. An examination of the contract will show that while the *habendum* clause, both in the lease and conveyance, contained the words "heirs, executors, administrators, and assigns," no such words appear in the condition, but on the contrary the agreement as to performance of the conditions is expressly between plaintiff and James L. Jones, and he personally and individually was bound to perform such conditions on his part. So there is nothing whatever in the terms of the instrument which indicates any purpose to make the condition otherwise than personal.

The contract, after providing the conditions to be performed by Jones personally, provides further that if said Jones shall at any time during the natural life of the plaintiff

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fail faithfully to keep and perform it and all the said covenants, conditions, and agreements, then the instrument shall be thenceforth utterly void and of no effect, and the plaintiff shall have the right to so declare it and at once thereafter enter upon, use, enjoy, and own all of the lands and premises in the same manner in all respects as if the instrument had never been made. It appears, therefore, that a substantial part of the consideration was the agreement on the part of Jones to render to plaintiff personal services. In such case the agreement will be treated in equity as a condition subsequent, and, if substantially broken through failure of the grantee to perform, the conveyance will be set aside. *Wanner v. Wanner,* 115 Wis. 196, 91 N. W. 671; *Glocke v. Glocke,* 113 Wis. 303, 89 N. W. 118; *Gall v. Gall,* 126 Wis. 390, 105 N. W. 953. As said by this court in *Glocke v. Glocke, supra,* courts of equity take jurisdiction in such cases not to forfeit a title, but to quiet a title already forfeited for nonperformance of a condition subsequent, and, to the end that a conditional grantor's remedy may be complete, it will cancel all writings and records which might otherwise be used presently or in the future to his prejudice. The question has so often been before this court that any extended discussion of the principle involved would seem unnecessary. After it has been established, as in this case, by the findings of the court below, well supported by the evidence, that the agreement between the parties was personal in its nature, at least in a substantial part, the right to have the conveyance set aside and the grantor restored as near as may be to her former rights follows.

It is claimed, however, that the setting aside of the conveyance operates as a fraud upon *Mary Finkleston,* therefore a court of equity ought not to lend its aid to plaintiff under the circumstances. But it is sufficient to say in this regard that the agreement between plaintiff and Jones was a matter of record, therefore constructive notice to Finkleston when he

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took his mortgage. He got no greater rights by his mortgage than Jones had. This he was bound to know whether he had actual knowledge of the record of the instrument between plaintiff and Jones or not. The same is true as regards the creditors of Jones, who were made defendants, but who are not complaining here. *Bishop v. Aldrich,* 48 Wis. 619, 4 N. W. 775; *Jewell v. Reddington,* 57 Iowa, 92, 10 N. W. 306; *Quatman v. McCray,* 128 Cal. 285, 60 Pac. 855; *Eastman v. Batchelder,* 36 N. H. 141; *Ridley v. Ridley,* 87 Me. 445, 32 Atl. 1005; *Clinton v. Fly,* 10 Me. 292.

It is further contended by defendant that there was no proper accounting, and that *Mary Finkleston* should have a lien upon the real estate in question for a larger amount than that given by the court below, and counsel suggests that this amount should be increased by interest on the excess each year between the amount paid by Jones and the amount of rental value, and states that the amount is $233.09, and argues that this amount was paid each year on the basis that there was $733.09 paid annually, while the rental value was but $500, leaving a balance in favor of Jones of $233.09, and that the owner of the mortgage, *Mary Finkleston,* is entitled to interest on this balance from the time such amount was paid, and he estimates the amount due to be $2,259.78 by the addition of this interest, instead of $1,864.78 as found by the court. We think the principle contended for by counsel is correct, but we do not see how he arrives at the exact amount of $233.09 as a basis for interest each year, beginning September 10, 1901. This conclusion of course presupposes that the payments made each year by Jones were identical, not only for taxes, but other items required to be furnished and services performed. Perhaps it may be said that, aside from taxes, the other items paid and furnished, namely, hay, oats, corn, and firewood, were the same each year, but it appears from the record that the taxes varied, and very materi-

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ally. For example, the taxes paid, as appears from the record, were as follows:

1899	$67 60
1900	61 44
1901	76 90
1902	87 72
1903	86 92
1904	89 36
1905	143 76
1906	152 46
1907	125 94
1908	99 72
Aggregating	$991 82

It seems the amount of taxes paid, as found by the court, conceded to be correct by counsel for appellant, and not sufficiently excepted to, is $864.78. We are unable to understand the inconsistency, from the record. But in any event, whether the amount of taxes paid be $864.78 or $991.82, it is clear that the annual payments would not be the same, so the appellant's theory of casting interest on the sum of $233.09 as the sum paid each year more than the rental value would not be a correct method. The amount of excess paid each year over and above the rental value should be ascertained as near as may be and interest cast upon that amount from the time of payment to the date of the judgment, and the aggregate of these several sums added to $1,864.78.

There is also another item which should be added to the amount of the *Finkleston* equitable lien, namely, the percentage which she should have received had she filed her claim against the Jones estate, which she declined to do believing her mortgage to be valid. The percentage paid to creditors on claims filed, as appears from the record, was between thirty and thirty-one per cent. It is obvious, however, that had the *Finkleston* claim under the mortgage been filed the percentage would have been reduced, and of course she would only be entitled to such reduced percentage, because her claim would increase the liabilities, thereby reducing the percentage. We

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have been unable to discover from the record what interest the *Finkleston* claim bore, therefore cannot determine the amount due upon the mortgage at the time of judgment. But whatever that amount may be, it was entitled to be filed against the estate and participate with other claims filed. Notwithstanding that it was not filed, and in view of the facts in this case on this equitable accounting, such amount should be charged against the land in question. In view of the condition of the record, we deem it best to remit the case for a statement of the account by the court below in accordance with this opinion, to the end that, if necessary, additional testimony may be taken.

It is further claimed by counsel that the finding of $300 for permanent improvements was not sufficient and that the amount should be larger. But we think this finding must stand, not only because it is supported by the evidence, but because there is no sufficient exception to it.

On the plaintiff's appeal it is insisted that the amount for which *Mary Finkleston* is given an equitable lien is too large, and that the credits allowed to Jones, aggregating $5,864.78, should not have been allowed, with the exception of the $300 for permanent improvements. This contention is based upon the idea that, since Jones paid these amounts in carrying out his contract, he is not entitled to credit for them after termination of the contract, and this upon the ground that he had not kept his contract, therefore could not be allowed for amounts paid during the performance of it and before breach by him. The plaintiff's contention is based upon *Morgan v. Loomis,* 78 Wis. 594, 48 N. W. 109, which counsel claims is directly in point. We cannot think, however, that that case is controlling. There the breach was wholly by the grantee, while in the case before us the death of Jones entitled plaintiff to rescission and restoration to her former rights, therefore no reason is apparent why in an equitable accounting, under the circumstances of the case, the Jones estate should not be

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credited with the amounts paid out under the contract in question. We therefore hold that the judgment should be modified on the defendant's appeal by giving the defendant *Mary Finkleston* an equitable lien upon the land for the same percentage on the amount due on her mortgage at date of judgment that the general creditors would have received on their claims had her claim been filed; also the difference between the rental value of the land, $4,000, and the amount paid under the conveyance, together with interest on the excess paid each year over amount received such year from time of payment to date of the judgment below.

By the Court.—The judgment of the court below is affirmed on plaintiff's appeal and reversed on defendant's appeal, and the cause remanded with directions to the court below to award the defendant *Mary Finkleston* an equitable lien for the amount which may be found due upon a proper accounting as indicated in this opinion.

Upon a motion by the plaintiff for a rehearing there was a brief by *T. M. Priestley* and *C. F. Osborn* in support of the motion, and a brief by *Grotophorst, Evans & Thomas* in opposition thereto.

The motion was denied April 23, 1912.

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PIZZO, Administrator, Respondent, vs. WIEMANN and another, imp., Appellants.

February 1—April 23, 1912.

Negligence: Unlawful acts: Sale of toy pistol: Death of user: Liability of wholesaler: Intervening acts: Proximate cause.

1. One who does an unlawful act knowing, or with reasonable ground to believe, that it may probably result, in the natural course of events, in causing injury to some human being and regardless of whether it does or not, is liable in legal damages for the consequences, though directly brought about by the acts of other persons intervening, set in motion by the first unlawful act, and regardless of such interveners having acted with such knowledge as to be likewise liable.
2. Under the above rule, wholesalers in this state who sold a toy pistol to retailers are liable in damages for the death of a boy caused by his using the pistol after buying it in this state from the retailers, the sale of such pistol being a criminal offense under sec. 4397*a*, Stats. (1898).

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action against wholesalers and retailers for damages caused by putting on the market and selling to the intestate, a boy about eleven years of age, a toy pistol, whereby he came to his death.

In the complaint, by appropriate allegations, this was stated: Defendants, Wiemann & Muench, wholesale dealers, sold a toy pistol, with other like articles, to the other defendants, who were retail dealers, for the purpose of supplying the trade with such goods. The retailers, pursuant thereto, placed said articles on sale and sold one to the intestate. In using it he came to his death. Both of such sales were made in and by residents of this state, and the consequences stated happened therein. Sales of such character are expressly prohibited by statute and punishable by imprisonment in the

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county jail, not more than six months, or fine, not exceeding $100, or both. The particular sale was made with full knowledge of the dangerous character of the article.

The facts were set forth in one cause of action, grounding the claim of liability on an executed combination of wholesalers and retailers to work off to customers for use, toy pistols in violation of the statute, and in a second cause of action, grounding the claim of liability on the article sold being to the knowledge of defendants inherently dangerous.

There was a general demurrer to the complaint by Wiemann & Muench which was overruled. They appealed.

For the appellants there was a brief by *Olin & Butler,* and oral argument by *W. R. Curkeet.* They cited *Curtin v. Somerset,* 140 Pa. St. 70, 21 Atl. 244; *First Presbyterian Cong. v. Smith,* 163 Pa. St. 561, 30 Atl. 279; *Losee v. Clute,* 51 N. Y. 494, 496; *McCaffrey v. Massberg & G. Mfg. Co.* 23 R. I. 381, 50 Atl. 651, 653; *Bragdon v. Perkins-Campbell Co.* 87 Fed. 109, 113; *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, 359, 11 N. W. 356, 911; *Cole v. German S. & L. Soc.* 124 Fed. 113, 63 L. R. A. 416, 422; *Insurance Co. v. Tweed,* 7 Wall. 44, 52; *Bellnio v. Columbia C. Co.* 188 Mass. 430, 74 N. E. 684; *Fishburn v. B. & N. W. R. Co.* 127 Iowa, 483, 98 N. W. 380; *Mo. Pac. R. Co. v. Columbia,* 65 Kan. 390, 69 Pac. 338, 341; *Washington v. B. & O. R. Co.* 17 W. Va. 190; *Fawcett v. Railway Co.* 24 W. Va. 755; *Schwartz v. Shull,* 45 W. Va. 405, 31 S. E. 914, 917; *Shippers C. & W. Co. v. Davidson,* 35 Tex. Civ. App. 558, 80 S. W. 1032; *Terminal R. Asso. v. Larkins,* 112 Ill. App. 366, 370; *Peoria v. Adams,* 72 Ill. App. 662, 672; *Andrews & Co. v. Kinsel,* 114 Ga. 390, 40 S. E. 300; *Pittsburg R. Co. v. Horton,* 87 Ark. 576, 113 S. W. 647, 18 L. R. A. N. S. 905, 907; *Holmes v. Delaware & H. Co.* 128 App. Div. 24, 112 N. Y. Supp. 421, 422; *Carter v. Towne,* 103 Mass. 507; *Arkansas V. T. Co. v. McIlroy,* 97 Ark. 160, 133 S. W. 816, 819; *Lutz v. A. & P. R. Co.* 6 N. Mex. 496, 30 Pac. 912, 16

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L. R. A. 819, 827, 829; *Claypool v. Wigmore,* 34 Ind. App. 35, 71 N. E. 509, 510, 511; 1 Thomp. Comm. on Neg. § 49; Thomp. Comm. on Neg. (White Supp.) § 54; and other authorities.

Elmore T. Elver, for the respondent, cited, among other cases, *Evans v. Waite,* 83 Wis. 286, 288, 53 N. W. 445; *Horton v. Wylie,* 115 Wis. 505, 508, 92 N. W. 245, 95 Am. St. Rep. 953; *Klatt v. N. C. Foster L. Co.* 97 Wis. 641, 645, 73 N. W. 563; *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 358, 85 N. W. 1036; *Sharon v. Winnebago F. Mfg. Co.* 141 Wis. 185, 188, 124 N. W. 299; *Binford v. Johnston,* 82 Ind. 426, 42 Am. Rep. 508, 512; 1 Sutherland, Dam. (2d ed.) 35; *Hasbrouck v. Armour & Co.* 139 Wis. 357, 365, 121 N. W. 157, 23 L. R. A. N. S. 876; *Waters-Pierce Oil Co. v. Deselms,* 212 U. S. 159, 29 Sup. Ct. 270, 53 L. Ed. 453; *Clement v. Crosby & Co.* 148 Mich. 293, 111 N. W. 745, 10 L. R. A. N. S. 588; *Wellington v. Downer K. O. Co.* 104 Mass. 64; *Stowell v. Standard Oil Co.* 139 Mich. 18, 102 N. W. 227; *Poland v. Earhart,* 70 Iowa, 285, 30 N. W. 637; *Ives v. Welden,* 114 Iowa, 476, 87 N. W. 408, 54 L. R. A. 854; *Driscoll v. Allis-Chalmers Co.* 144 Wis. 451, 129 N. W. 401; *Glettler v. Sheboygan L., P. & R. Co.* 130 Wis. 137, 109 N. W. 973; 29 Cyc. 565; *Keeley v. G. N. R. Co.* 139 Wis. 448, 451, 121 N. W. 157; *Milwaukee & St. P. R. Co. v. Kellogg,* 94 U. S. 469, 24 L. Ed. 256; *Sparks v. Wis. Cent. R. Co.* 139 Wis. 108, 120 N. W. 858; *Cleveland, C., C. & St. L. R. Co. v. Patterson,* 37 Ind. App. 617, 623, 75 N. E. 857; *Powers v. Harlow,* 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154; *Dunlap v. Wagner,* 85 Ind. 529; *Weick v. Lander,* 75 Ill. 93; *Lane v. Atlantic Works,* 111 Mass. 136.

The following opinion was filed February 20, 1912:

MARSHALL, J. The appeal presents for solution this question: In case of an article being regarded by the lawmaking power so inherently dangerous to human safety that the pub-

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lic welfare requires the sale thereof in this state to be prohibited, and the same is by written law so dealt with; violations of the statute being made criminal and subject to severe punishment, and of a wholesaler in this state nevertheless selling such articles to another to be sold, or knowing that he will probably offer them for sale, at retail herein, and of such articles being so offered, in consequence of which one is purchased by a person who in using it is injured and loses his life through the danger the law was designed to prevent,—does a cause of action thereby accrue to the personal representative of the deceased for the benefit of those entitled under the law to compensation for damages caused to them by such premature death?

The question, it will be noted, is carefully fenced about so as to be accurately tested by established principles. It does not present anything new. It does not call for even a novel extension of an old principle to a new situation. The proposition is clear-cut and plain, and so is the principle of law governing it. To appreciate that, due significance must be given to these features: (a) The legislative policy, in the interest of public welfare, preventing the sale of such articles; (b) Actual or presumed knowledge of the prohibition; (c) Violation of law by the wholesaler, knowing the probable necessary effect may be to cause subsequent violations by the retailers, creating the danger the law was designed to prevent; in the whole, violation of law knowing, or having reasonable ground for knowing such violation to be the commencement of a chain of circumstances liable to eventuate in the prohibited and dangerous article reaching individual users, contrary to law, to their injury.

With the special features of the proposition significantly in view, it will be seen that it is emphatically ruled in the affirmative by the logic of *Hasbrouck v. Armour & Co.* 139 Wis. 357, 121 N. W. 157, and, directly, by many adjudications of courts of high repute elsewhere, which are amply represented by citations in the briefs of counsel. *Waters-Pierce*

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Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. Ct. 270; *Stowell v. Standard Oil Co.* 139 Mich. 18, 102 N. W. 227; *Skinn v. Reutter,* 135 Mich. 57, 97 N. W. 152; *Clement v. Crosby & Co.* 148 Mich. 293, 111 N. W. 745.

Many authorities are referred to on both sides which do not fit the case at all points. The case is not one on contract, nor even for ordinary negligence, where the doctrine of supervening fault applies, nor one where the article was not dangerous in itself, or one where the article was dangerous to the knowledge of the wholesaler, but not to that of the retailer, or the danger was known to both, but not to the person injured. This is a case where the placing of the article on the market was condemned by law, and absolutely prohibited for the very purpose of preventing opportunity for its purchase and use, regardless of the knowledge by the user, of the danger. It was a criminal act. It was, to all intents and purposes, an act done regardless of human safety and human life. The original sale was the initiating cause to which all others tied naturally in proximate relation. The nature of the wrongful act was such that contributing negligence on the part of the last purchaser is immaterial to either criminal or civil liability of the sellers. The rule applies, that one who does an unlawful act, knowing or with reasonable ground to believe that it may probably result, in the natural course of events, in causing injury to some human being, and regardless of whether it does or not, is liable in legal damages for the consequences, though directly brought about by the interveners set in motion by the first wrongful act, and regardless of such interveners having acted with such knowledge as to be likewise liable.

It follows that the complaint states a good cause of action, the demurrer was properly overruled, and the order appealed from must be affirmed.

By the Court.—So ordered.

A motion for a rehearing was denied April 23, 1912.

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CHARRON, Respondent, vs. NORTHWESTERN FUEL COMPANY, Appellant.

February 20—April 23, 1912.

Master and servant: Injury: Negligence: Fellow-servants: Leaving employment: Stopping to rest: Contributory negligence: Settlement: Release of claim: Rescission: Mental incompetency: Voluntary payment to wife of injured person.

1. Members of a carpenter's repair gang engaged in making repairs and changes on the premises of the master, in the discharge of the latter's duty to provide a safe place to work, are not fellow-servants with ordinary employees who are simply employed to carry on the employer's business.
2. If a servant voluntarily and unnecessarily leaves his employment and assumes a position of peril merely for his own pleasure or convenience he ceases to be an employee for the time being and becomes either a trespasser or at best a mere licensee.
3. But a workman employed in hard physical labor who, while stopping for a moment's respite of the ordinary and usual nature, steps a few feet from his line of travel, is not thereby divested of his character as an employee.
4. Plaintiff, a member of a gang of carpenters who were repairing defendant's coal dock, was required, in the performance of his duties, to cross a platform underneath a rig upon which a suspended clam-shell bucket was operated. His line of travel crossed the path of the bucket at right angles. In one of his trips across this platform he stopped a minute or two to rest and had stepped to the edge of the platform, about eight feet from his line of travel, and was looking down upon a vessel at the dock, when the bucket, which had been started without warning, swept him off the platform, injuring him severely. *Held*, that the jury were justified in finding that defendant's failure to give warning before starting the bucket constituted a want of ordinary care, and that plaintiff was not guilty of contributory negligence in stopping upon the platform as he did.
5. One who has received money or property in settlement of a disputed claim and given a release cannot maintain an action at law on the claim without rescinding the contract of settlement for some legal cause and returning or offering to return the consideration received.

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6. Where, at a time when an injured employee was incompetent to act, the employer secured a release signed by the employee's wife and by the employee himself with a mark, and turned over to the wife a check in settlement of the claim for the injury, and the wife used the proceeds of the check without her husband's knowledge or consent, the transaction constituted a voluntary payment to the wife without the husband's knowledge, rather than a settlement and release of the claim; and the rule above stated as to rescission is inapplicable.

APPEAL from a judgment of the circuit court for Douglas county: E. W. HELMS, Judge. *Affirmed.*

Action for personal injuries suffered by plaintiff while at work upon defendant's coal dock at Washburn, Wisconsin, May 27, 1907. He was a common laborer engaged in helping a gang of carpenters in making extensive repairs upon the dock at the time of the injury. The dock is used for unloading coal from lake vessels. Along the face of the dock and near the edge are a considerable number of frame structures, called unloading rigs, and by means of them clam shells or buckets, suspended from a carriage, are run out over the boats on a horizontal boom, lowered down into the hold of the vessel, and then raised to the boom and run back through the framework of the unloading rig and emptied in the yard at the proper place on the shore side of the rig. The clam is then brought forward, suspended from its carriage which runs upon the boom, and the operation repeated. Each clam is operated by a hoister, who is stationed in a hoisting shanty placed on the superstructure of the rig, and he, by means of levers, runs the clam backwards and forwards, and raises, lowers, and dumps it. The unloading rigs are side by side, and really form one long continuous open framework nearly or quite forty feet high over all, but each clam shell and boom is operated by itself and by one hoister. The hoister's shanty is about twenty feet above the dock, and has windows towards the water and towards the side and rear of the dock. When the clam shell is at rest and not in use it hangs suspended

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from its carriage at about the level of the floor of the shanty and some sixteen feet back from the harbor face of the rig. When the hoister brings it into operation it moves rapidly forward, practically in a horizontal line, through an open space in the rig structure and at a distance of a few feet from the hoister's shanty, and passes out from the harbor face of the rig far enough so that it can be lowered into one of the hatchways of a vessel lying at the dock. In passing through the rig structure it passes three or four feet above a platform or covered space some twelve feet or more square. This space is from time to time used as a passageway by the defendant's employees as they find it necessary to pass from one rig to another.

On the morning of the accident the plaintiff was directed to carry some planks to the carpenter gang, which was making repairs on the upper part of rig No. 3. The rig on which the accident happened was rig No. 4 and was located between Nos. 3 and 5, all being really a part of the same general structure. The plaintiff took a plank and went up an open stairway between rigs Nos. 5 and 4 and reached the platform or landing above referred to on rig No. 4. Crossing this platform near the rear part thereof and passing near the hoister's shanty, he reached another ladder at the rear of rig No. 4, which he climbed and thus reached the upper part of the structure on rig No. 3. Here he put down his plank and returned by the same route to get another plank. He passed the hoister's shanty on rig No. 4 on his return trip and reached the platform safely. The hoister saw him pass his door just before reaching the platform. When he reached the platform he testifies that he started to walk straight across it (practically at right angles with the path of the clam shell when in operation), and that the clam shell was started at that moment by the hoister and swept across the platform, knocking him down and carrying him over the edge, where he fell to the vessel below and received very serious injuries. Here the plaintiff is contradicted by several witnesses, who

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testified to the effect that when he reached the platform he advanced about eight feet to the edge thereof, facing the harbor, and stood there for a short space of time, with his hand against the hoister's shanty, looking down at the vessel below, and that the clam shell struck him while in that position. The hoister testified that it was two or three minutes after the plaintiff passed the shanty before he started the clam shell. It is undisputed that the clam shell was started without warning and that this was the first trip which it had made that morning, also that the plaintiff's duty did not call him to the edge of the platform.

Some weeks after the accident a settlement was made with the plaintiff, and the sum of $280 paid and a release signed by him. The plaintiff claimed, however, that he was mentally incompetent to make any settlement; that he received no money himself, but that the money was received by his wife and spent without his knowledge or authority; that he was insolvent and unable to return the money, but desired that it might be credited on any verdict which he might obtain. The jury returned the following special verdict:

"(1) Was the plaintiff, at the time he was struck by the clam, walking across platform 4 from stairway to stairway? *A.* No.

"(2) Was the plaintiff, at the time he was struck by the clam, standing near the edge of platform 4 facing toward the water? *A.* Yes.

"(3) Was the defendant guilty of want of ordinary care on the morning in question in starting the clam without giving any warning or signal to carpenters or their helpers, who might be crossing platform 4 in connection with their work? *A.* Yes.

"(4) If you answer 'Yes' to question 3, then answer this: Was the want of ordinary care found by your answer to question 3 the proximate cause of plaintiff's injury? *A.* Yes.

"(5) Did the plaintiff fail to exercise ordinary care for his own safety, which contributed proximately to his injury? *A.* No.

"(6) Did the plaintiff, at the time he came from above to

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platform 4, immediately before his accident, know that the work was about to start on rig number 4? *A.* No.

"(7) Would a person of ordinary intelligence and prudence under the circumstances surrounding plaintiff when he arrived at platform 4, and possessed at that time of the same knowledge and experience of the previous operations upon said dock that plaintiff possessed, in the exercise of ordinary care, have understood that work was about to start upon rig 4? *A.* No.

"(8) If you answer question number 2 'Yes,' then answer this: Would plaintiff have been struck by the clam and injured had he not been standing at the edge of the platform facing the water? *A.* Yes.

"(9) Did the starting of the clam in motion from a stationary position on the runway make sufficient noise to be heard by persons within or near the line of the clam's travel for a distance of fifty feet or more? *A.* Yes.

"(10) Was the plaintiff on July 9, 1907, mentally competent to make settlement? *A.* No.

"(11) If you answer question number 10 'No,' then answer this: Did the plaintiff, before commencing this action, on the 15th of September, 1908, know of and understand that he had received $280 upon a settlement? *A.* Yes.

"(12) What sum of money will fairly compensate plaintiff for the injuries he received at the time of the accident? *A.* $5,000."

The trial court made a special finding of fact to the effect that the defendant acted in good faith in making the alleged settlement, and without knowledge of the plaintiff's incompetency.

The defendant moved to change the answers to questions 4, 5, and 8 of the verdict, and also moved for judgment on the verdict, which motions were overruled and judgment rendered for the plaintiff for $4,720, from which judgment the defendant appeals.

For the appellant there was a brief by *Luse, Powell & Luse,* attorneys, and *Abbott, Merrill & Lewis,* of counsel, and oral argument by *H. T. Abbott* and *L. K. Luse.*

Victor Linley, for the respondent.

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The following opinion was filed March 12, 1912:

WINSLOW, C. J. The material contentions of the defendant are three in number, viz.: (1) that the hoister was a fellow-servant; (2) that the plaintiff was entirely outside of the line of his duty when he was injured; and (3) that he cannot recover in any event, because he has not returned or offered to return the amount received by him in settlement of his claim.

1. The first contention must fail. The evidence clearly shows that the plaintiff was a member of a carpenter's repair gang which was making extensive repairs and changes in the structure. Such workmen are discharging the duty of the master to provide a safe place to work, and are not fellow-servants with ordinary employees who are simply employed to carry on the employer's business in the structure. *Sparling v. United States S. Co.* 136 Wis. 509, 117 N. W. 1055, and cases there cited.

2. Whether at the time of the accident he had so far departed from his duty that the relation of master and servant did not exist for the time being is a more difficult question. It is established that no duty called him to the precise place where he was struck, and that he was in fact standing at the edge of the platform, some eight feet from his line of travel, gazing down at the operations on the vessel below, when the clam shell struck him. How long he had stood there is not determined by the jury, but the most of the witnesses who testified to seeing him there state that he stood there a minute or two; three minutes seems to be the longest time allowed by any witness; but they are all estimates, and we are all cognizant of the utter unreliability of any estimate of elapsed time under such circumstances. Probably the most that can be said is that it was somewhere between one minute and three minutes. Of course, the principle is well established that if a servant voluntarily and unnecessarily leaves his employment and assumes a position of peril merely for

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his own pleasure or convenience he ceases to be an employee for the time being and becomes either a trespasser or at best a mere licensee. 26 Cyc. p. 1224, sec. 9; 2 Labatt, Mast. & Serv. p. 1851, sec. 629; *Goff v. C. R. & M. R. Co.* 86 Wis. 237, 56 N. W. 465.

But the law aims to be reasonable. It recognizes that it has to deal with imperfect human beings and not with faultless and unerring automatons, and that its rules should be shaped accordingly. It must recognize the fact that men employed in hard physical labor require and habitually take some brief respite at times during the work as opportunity offers; and it must also recognize the fact that such a respite, if only of the ordinary and usual nature, cannot rightly be called a leaving of the employment. In the present case the plaintiff had just carried a plank, doubtless of considerable weight, to the top of the structure. In returning he stopped for a minute or two at a convenient stopping place, stepped perhaps eight feet from his line of travel, and gazed at the operations upon and about the vessel and the harbor below, which were doubtless interesting and attractive. We do not feel that we are obliged to hold or ought to hold as matter of law that this brief and very natural break in the plaintiff's routine labor divested him of his character as an employee. We have been referred to no authorities which bear a very close analogy to the present case, and we are content to rest the ruling upon general principles.

This question being disposed of, no good reason appears why the jury were not amply justified in finding that there was want of ordinary care on the part of the defendant in starting the clam without warning, and that the plaintiff was not guilty of contributory negligence.

3. Doubtless the rule is general that one who has received money or property in settlement of a disputed claim and given a release cannot maintain an action at law on the claim without rescinding the contract of settlement for some legal cause, and returning, or offering to return, the consideration

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received. This is simply an application of the general principle that one who wishes to rescind a contract for fraud or mistake must rescind *in toto,* except in cases where there may be a severance of one part of the contract, in which event a partial rescission is sometimes allowed in the interests of justice. *Gay v. D. M. Osborne & Co.* 102 Wis. 641, 78 N. W. 1079. It is clear that the present case is not one in which there could be any severance.

The difficulty in the application of the rule to the present case is that it cannot be said that the plaintiff ever knowingly or in fact received any money or property. The evidence shows that at the time of the supposed settlement, after the terms were agreed to, a check for $280 was put upon the table by the defendant's agent, payable to plaintiff's order; that plaintiff's wife signed the plaintiff's name to the release and the plaintiff made his mark thereto, and the defendant's agent left the room, leaving the check upon the table. The verdict of the jury establishes the fact that the plaintiff was incompetent at the time, and this finding is not seriously attacked. The check was cashed at the bank by plaintiff's wife, who apparently signed her husband's name on the back. The plaintiff never received any money, and testifies that he never had the check or any money therefrom in his possession, and never knew that his wife had the check or the money, or that she used it, until after the present action was commenced. The fact seems to be that his wife used the money for family expenses during plaintiff's illness and incompetency without his knowledge or authority. It also appears that it has been utterly impossible for the plaintiff to earn or obtain from any source enough money to make a tender of repayment.

Now if it be a fact, as the jury found, that the plaintiff was incompetent to act at the time the settlement was made and that the check was in fact turned over to his wife and the proceeds used by her without his knowledge or consent, it seems to us that it can hardly be said that he received any consideration for the release. It is rather the case of a vol-

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untary payment made to the wife without the husband's knowledge. A party must certainly have opportunity to say whether he will or will not receive money in settlement of a claim, and this opportunity, under the uncontradicted evidence, *Mr. Charron* never had.

Some objections of a trifling nature are made to certain minor rulings on testimony, but they are not deemed of sufficient importance to justify treatment.

By the Court.—Judgment affirmed.

VINJE, J., took no part.

A motion for a rehearing was denied April 23, 1912.

OLSON, Respondent, vs. OLSON, Administrator, Appellant.

February 1—April 23, 1912.

Parent and child: Agreement to pay for past and future services: Consideration: Entire contract.

1. Evidence that a son who, after attaining majority, had worked for his father on the latter's farm at intervals for about fifteen years, said to his father that he had remained at home more than the other members of the family; that thereupon the father said he would give him $1,000 for the work he had done and $20 per month for future work; and that the son said "all right," and continued to work for the father until the death of the latter, is *held* to sustain a verdict to the effect that the agreement was that the son should remain and work for the father in consideration of the latter's promise to pay him for both past and future services.
2. Such being the agreement, and the son having fully performed on his part, the entire contract as to payment for past services as well as for those to be rendered thereafter was based upon a valid consideration.

APPEAL from a judgment of the circuit court for Pierce county: E. W. HELMS, Circuit Judge. *Affirmed.*

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Thos. M. Casey, for the appellant.
George Thompson, for the respondent.

TIMLIN, J. The respondent, after he reached the age of twenty-one years, worked for his father, the decedent, on the farm of the latter at intervals during the years from 1889 until about April 1, 1905. While so engaged and on or about the date last mentioned, according to the testimony of a girl then temporarily in the family, in a talk between *Martin* and his father "about work and some other things," *Martin* said to his father that he, *Martin,* had remained at home more than the other members of the family, whereupon his father said he would give *Martin* $1,000 for the work he had done and $20 per month for future work. *Martin* said: "All right," and that ended the conversation. *Martin* thereafter continued to work for his father until the death of the latter on October 3, 1906. *Martin* filed his claim against the estate of his father; and upon the foregoing evidence relative to the contract and other evidence showing the nature and extent of the services performed, upon appeal to the circuit court, a jury in that court found a verdict for respondent and fixed the amount of his recovery at $1,374.50.

The trial court instructed the jury to the effect that there could be no recovery for this $1,000 for past services if that part of the agreement was distinct or separate, but that in order to entitle respondent to recover this $1,000 the jury must be convinced that the promise on the part of the father, if he made one, to pay the respondent $1,000 for past services, was a part of the same agreement by which he promised to pay $20 per month for future services, and that it was in consideration of such entire contract that the respondent agreed to and did remain and perform services after the conversation testified to. There are some slight inaccuracies in the instructions, but they are substantially as stated.

The evidence to the effect that *Martin* worked for his father after reaching his majority is ample, but that relating to the

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agreement is quite weak. Still we must keep in mind that *Martin* was disqualified from testifying to the agreement and the other members of the family would naturally be adverse to his claim, and that the only witness available to him was endeavoring to narrate a conversation overheard by her several years before. Formal expressions are rarely used in such transactions between father and son, and that such agreement was made is not inherently improbable. The conversation narrated will fairly bear the inference drawn by the jury, although no formal expression found therein covers such case with precision. There is only one version of the contract given and that is not very clear or satisfactory, except to the effect that some kind of a promise was made. The question whether the parties intended and understood that *Martin* should remain in consideration of that part of the promise relating to the future wages of $20 per month and that he did so remain or understood that he should remain and did remain in consideration of the two things said by the decedent by way of promise in this conversation, was, we think, fairly for the jury. It was a matter of inference from the words used, the final assent of *Martin* at the close of the conversation, and the subsequent act of *Martin* in remaining until his father's death. This court will not disturb a verdict on the ground that it is contrary to evidence where the trial court has refused to set aside the verdict and there is credible evidence to support such verdict (*Plano Mfg. Co. v. Frawley,* 68 Wis. 577, 32 N. W. 768; *Schrubbe v. Connell,* 69 Wis. 476, 34 N. W. 503); and where the evidence is such as to justify either of two inferences, the decision of the trial court must control on appeal. *Spuhr v. Cobb,* 111 Wis. 119, 86 N. W. 562. This applies to verdicts with even greater force.

With reference to the law of the case: If by the transaction in question, consisting of the oral conversation testified to and the subsequent acts of the parties, a new contract was created whereby the respondent agreed to continue to work for his

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father in consideration that the latter should pay him $1,000 for past services and $20 per month for future services, and this was performed on the part of respondent by continuing to work for his father until the death of the latter, the case falls within the rule of *Loomis v. Newhall,* 15 Pick. 159; *Irwin v. Locke,* 20 Colo. 148, 36 Pac. 898; *Roberts v. Griswold,* 35 Vt. 496; and *Graham v. Stanton,* 177 Mass. 321, 58 N. E. 1023. See, also, *Wolford v. Powers,* 85 Ind. 294, and *Trimble v. Rudy* (22 Ky. Law Rep. 1406, 60 S. W. 650) 53 L. R. A. 353 and cases in note. There is in such case a valid consideration to uphold the whole contract.

By the Court.—The judgment of the circuit court is affirmed.

KEILLY, Appellant, vs. SEVERSON and another, Respondents.

February 1—April 23, 1912.

Appeal: Review: Findings of fact: Vendor and purchaser of land: Notice of rights of person in possession: Sale by administratrix: Indirect purchase by her: Void or voidable? Equity: Who may have relief: Specific performance: Oral contract of sale: Part performance: Ratification.

1. The clear preponderance of evidence which is required to warrant this court in disturbing the trial court's findings of fact must appear so manifestly from the record, after resolving all fair doubts in their favor and giving proper weight to the advantages of the trial court, as not to depend on a nice weighing of probabilities.
2. One who buys real estate of another while it is in possession of a third person takes with notice of all facts which such situation would suggest or which could be obtained by diligent inquiry.
3. A sale of real estate of a decedent by an administrator, if the latter is directly or indirectly interested therein, is constructively fraudulent under sec. 3914, Stats. (1898), regardless of whether there was any bad intent or actual injury to any one the statute was designed to protect.

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4. But the word "void," as used in said sec. 3914, means voidable; and the purchaser at a sale made in violation of that section is vested with the legal title, and can be divested thereof only in a proper action brought within a proper time by a person entitled to challenge the validity of the sale.
5. Equity opens its doors whenever necessary to prevent fraud and injustice and where the relief asked conforms with principles of rectitude and honesty; but there is no inflexible rule requiring that the suitor shall himself be wholly without fault.
6. A widow who, to retain the home for herself and children, procured her brother to become purchaser of the land in question at the sale thereof by herself as administratrix, under an agreement that he should convey to her, and who paid the purchase price herself to the estate and was allowed by the brother to remain in peaceable possession, paying taxes and treating the property as her own for a period of fourteen years, at the end of which time he repudiated the agreement and conveyed to a third person who brought ejectment, is *held* entitled to equitable relief and to a conveyance from such grantee, notwithstanding her own violation of law in respect to the sale.
7. Under the facts stated, the case is not one where the consideration was paid by one person and title taken in the name of another and a resulting trust is sought to be established, nor one in which relief is asked by the defendant upon the ground of the invalidity of the sale made in violation of sec. 3914, Stats. (1898), but stands upon the same footing in equity as if there had been an oral contract of sale to the defendant after the administratrix's sale, which, after the lapse of time and under the circumstances of part performance, is enforceable under general principles of equity jurisprudence.
8. Where by fair inference material evidentiary circumstances upon which there is a conflict of evidence are within the scope of the trial court's findings as made, they may properly be considered on appeal as if specifically found in conformity with the judgment.
9. Ratification of a transaction may relate back or have effect *in præsenti* according to the equities of the particular situation.

TIMLIN, J., dissents.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action in ejectment. It was tried by the court. The is-

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sues and nature of the evidence are indicated by the following epitome of the findings:

In 1895, defendant *Emma Severson,* as administratrix of the estate of one Torhoug, sold and conveyed the real estate in question for $170 to one Erickson. He is a brother of *Emma Severson* who is the widow of said Torhoug. Prior to said sale she and said Erickson agreed that he should become purchaser at the sale, take the title in his own name and, later, convey the property to her. She paid the estate the $170. After the property was so conveyed to Erickson, he satisfied a mortgage upon some other property, which Torhoug gave in his lifetime. The mortgage was given without consideration and the satisfaction was not in consideration of conveyance to Erickson of the particular property. *Emma Severson,* since the death of Torhoug, August 6, 1893, has been in the open notorious possession of the property. Plaintiff took his conveyance from Erickson with notice of *Emma Severson's* possession and of the then existing controversy between her and Erickson.

Upon such facts the court concluded, as matter of law, that *Emma Severson* was entitled to possession of the property as against plaintiff, and having pleaded the facts as an equitable counterclaim was entitled to judgment requiring plaintiff to convey to her the legal title thereto, or in default thereof that such title be vested in her by judgment of the court.

Judgment was accordingly rendered and plaintiff appealed.

For the appellant there was a brief by *Aylward, Davies, Olbrich & Hill,* and oral argument by *C. N. Hill.*

Charles N. Brown, for the respondent.

Marshall, J. The findings of fact seem to have such basis in the evidence as to preclude disturbing them in any material particular. Counsel argue to the contrary at some length by a process of reasoning and method of analysis some-

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what out of harmony with the rules governing the subject. The clear preponderance of evidence required to warrant condemning a trial court's findings, must appear so manifestly from the record,—after resolving all fair doubts in their favor and giving proper weight to those features in evidence below which could not be made to appear here,—as not to depend on any very careful weighing of probabilities. With this we pass the first complaint made without referring to the evidence except as to its general character.

The findings indicate this general situation: When the action was commenced appellant had the legal title to the property in question with the right of possession as claimed, unless respondent had a superior right, in that she was the equitable owner and was entitled to retain possession as against appellant and to be clothed with legal ownership.

Since appellant took title from Erickson with efficient notice on his part of the relations of respondent to the property, her rights therein were not affected by the change in legal ownership between the administrator's deed and the commencement of the suit. If one buys real estate of another while the subject of the transaction is in possession of a third person, he is presumed to act with notice of all facts which such situation would suggest, or which could be obtained by diligent inquiry. *Martin v. Morris,* 62 Wis. 418, 22 N. W. 525; *Roberts v. Decker,* 120 Wis. 102, 97 N. W. 519.

There can be no question but that respondent violated the statute, sec. 3914, Stats. (1898), prohibiting an administrator from directly or indirectly purchasing or being interested in the purchase of any real estate sold by him. It is provided that all sales made contrary to such prohibition "shall be void." So respondent committed a wrong in law without moral turpitude in the particular circumstances of the case. However, absence of any bad intent or actual injury to any one the statute was designed to protect, does not affect the nature of the title created by the improper transaction. By

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the policy of the statute, regardless of the real purpose of the parties, the sale was constructively fraudulent, and efficiently so, if appellant is entitled to the benefit of the statute under the circumstances. The law in respect to the conduct of administrators is very important, and the court in all situations to which it applies must hold to a high standard of accountability.

In further discussing the case it must be appreciated that the word "void," as used in the statute, means voidable. Until a sale made in violation of it be set aside in a proper action, the purchaser is vested with the legal title to the land and he cannot be divested thereof except in such proper action brought within a proper time by a person entitled to challenge, efficiently, the validity of the sale. *McCrubb v. Bray,* 36 Wis. 333; *Martin v. Morris,* 62 Wis. 418, 22 N. W. 525; *Gibson v. Gibson,* 102 Wis. 501, 78 N. W. 917.

The defect in the sale here, even as to a person the statute was designed to protect, was cured before commencement of this litigation by sec. 3918 of the Statutes limiting the operation of sec. 3914, in the circumstances of this case, to five years next after the sale. Moreover, the sale being voidable only, by force of the policy having for its object the protection of persons who might be injured because of being interested in an estate or claiming in some way under the devisee,—persons within the contemplation of sec. 3918, neither Erickson nor appellant is within the saving grace of the law. Furthermore, appellant does not base his claim of right upon the invalidity of the sale. He claims under it.

So the character of the sale to Erickson does not cut any figure in this case, except as it has to do with the status of respondent in a court of equity. She, in effect, appealed to that jurisdiction in defense and for affirmative relief because of an alleged wrong, made possible by her own violation of law. In such circumstances, under the peculiar facts, did she come into such jurisdiction with clean hands, under the rule

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on that subject? If not, relief should have been denied to her in any event.

It is often, rather illogically, said that a person cannot successfully appeal to a court of equity unless he, himself, is without fault. If that were literally true, great wrongs, cognizable only in that jurisdiction, would go unredressed because of the victim being guilty of some fault of insignificant character as compared with that of his adversary, as in this case. Here there was reprehensible moral turpitude, as doubtless the trial court looked at the matter,—such that appellant, standing in the shoes of Erickson, should not reap the fruits thereof by shielding himself behind the really harmless fault, as to him; in plain violation of a quite dominating rule in equity, that no one can profit by his own wrong. *Nemo ex suo delicto meliorem suam conditionem facere potest.* All such rules are subsidiary to the all-pervading major principle, "Equity opens its doors whenever necessary to prevent fraud and injustice and where the relief asked conforms to the principles of rectitude and honesty." *Warden v. Fond du Lac Co.* 14 Wis. 618, 620.

So, within a broad range, it rests in the conscience of the chancellor, whether, under the particular circumstances of the particular situation, equity ought to reach out its protecting arms in defense or redress. The seeker for such protection may not be wholly without fault and yet be entitled to some consideration. Do the principles of rectitude and honesty which should be the guide of human conduct, require or justify equitable interference? That is the test. There is no such stern rule as would close the eyes and ears, so to speak, of equity to the picture or cry of a distressed petitioner merely because of his hands not being entirely clean.

In the light of the foregoing, it is considered that the trial court did not go astray in deciding not to reject respondent's claim because of her violation of the statute. As said before, substantially, it was a wrong without injury to any one con-

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cerned in this litigation. The fault was participated in by both parties to the transaction. There was no real moral turpitude on her part,—no bad intent to injure. The sole purpose, as it seems, on her side was, without real prejudice to others, to acquire the home on which she and her husband had resided for a long time before he died, that she might continue to have a home there for herself and children. Erickson was her brother. He evidently co-operated to enable her, legally, as he probably thought, to avoid losing her home. The agreement to buy in the property and convey it to her, he ratified after the sale by permitting her to pay the consideration into the estate out of her own money. He did not put a dollar into the property, even by payment of taxes, for many years after the transaction. For some five or more years the land was not assessed to him. It was then so assessed by his direction without consultation with her. It seems that at such time, or thereabouts, he conceived the idea of wronging his sister by refusing to convey the property to her, and later thought to put it beyond her reach by making the conveyance to appellant, his son-in-law. He, to all intents and purposes, after the sale, as before indicated, affirmed the arrangement with his sister, to the end that she might retain the home for herself and children, by not only requiring her, in legal effect, to make such payment, but by leaving her to pay the taxes and treat the property as her own for years. He did not assert title adversely to her by conveying the land till some fourteen years had elapsed. For substantially all that time, she was permitted to remain in undisturbed possession of the farm, to all intents and purposes as if it were her own. Her right to a deed was not denied till near the last, but when she asked for one some excuse was given for not complying, which was not inconsistent with the rightfulness of her demand.

True, there is a conflict, more or less serious, as to some of the evidentiary circumstances referred to, and there are no specific findings as to some of them; but, by fair inference,

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they are all within the scope of the finding wherein the trial court proposed deciding that respondent, from the date of the deed to Erickson down to the transfer to appellant, remained, openly and notoriously, in possession of the premises as owner. It is thought quite clear that, subsidiary to that conclusion, the evidentiary circumstances suggested as established by the evidence, were found to exist. Thus looking at the matter, it is considered they should stand as if specifically found.

The logical result of this decision is that the contention of appellant is wholly without equity and, notwithstanding the initial fault, there is a very strong equity in respondent's favor. She, in effect, took and retained possession of the property under Erickson. As before indicated, the circumstances are equivalent to an agreement between the parties, made after the sale, that he would sell to her for the amount bid for the property. The ratification after the administrator's sale, should, if necessary, be deemed, in equity under the circumstances, as giving effect to the arrangement as of the time of the later circumstance. Ratification may relate back or have effect *in præsenti* according to the equities of the particular situation.

Thus the trial court was warranted in treating the case as presenting a situation calling for specific performance of respondent's contract with Erickson. It is quite clear after so much time, during which she occupied the property under such contract, a wrong would be committed against her for which there would be no adequate redress, if redress at all, if she were denied the relief embodied in the judgment.

The foregoing leads to these further observations to guard against its being thought that any feature of the written law has been overlooked.

The case is not one of consideration paid by one, title taken in another and a subsequent attempt to charge the latter as trustee of the former; so sec. 2077 of the Statutes does not apply. Neither is it one of asking for relief on the ground

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of the validity of a sale though made in violation of sec. 3914. The case stands upon an admitted voidable sale, as to any person whom the statute was designed to protect, the voidable character, however, having been cured by the statute of limitations and not, in any event, being available to a person not within the protecting purpose of the violated law. The situation, in practical effect, is the same as the ordinary one of a verbal contract conveying real estate, so far performed on one side as to take it out of the statute requiring interests in realty to be created in writing; sec. 2304, Stats. (1898), and, being so taken out, the contract is enforceable on general principles of equity and under the statute, sec. 2305. It having been impossible to establish respondent's right without disclosing her violation of sec. 3914 and thus showing that her prior wrong was an efficient element in producing the situation of which she complained, it became important to her status in equity to take account of the fact that the sale was voidable only, and not that as to appellant; that the infirmity, in any event, was cured by the statute of limitations; that it did not involve any moral turpitude or dereliction which, under the circumstances, ought to efficiently affect her status in the controversy with appellant who has no right, whatever, which he could well stand on in a court of equity, referable to the original infirmity in the title. Coming down to the ultimate, this was the simple question involved: Was there, in practical effect, a verbal sale, void at its inception under sec. 2304 of the Statutes, but after the lapse of time and under the circumstance of part performance, enforceable under general principles of equity jurisprudence and sec. 2305, Stats. (1898)? It is the judgment of the court that the trial decision rightly resolved such question in the affirmative.

By the Court.—Judgment affirmed.

TIMLIN, J. (*dissenting*). In this action of ejectment it appears without dispute that the respondent *Emma Severson,*

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as administratrix, made an oral agreement with appellant's grantor, her brother, that the latter should buy at her administratrix's sale in his name for her a parcel of land belonging to the estate of her decedent. He did so and received a deed of this land from her as administratrix. She remained in possession, but never received any deed of conveyance. This purchaser at her sale conveyed to the appellant, his son-in-law, who brought ejectment against the respondent for the land, but who by reason of her possession was chargeable with notice of respondent's equities, if she had any. These are the controlling and undisputed facts. The court below concluded that judgment should be entered dismissing the plaintiff's complaint with costs, and that the plaintiff be adjudged to convey to the defendant all right, title, and interest which he had or claimed in the land, etc., but rendered judgment merely dismissing the complaint. The appellant showed by this deed from respondent legal title to the land as against respondent and the right to possession, unless the said oral agreement found to have been made with respondent defeated that right. Waiving all inquiry with regard to form, the cause should have been disposed of under the following legal rules:

We have in this state a statute, sec. 3914, Stats. (1898), which provides:

"The executor, administrator or guardian making the sale . . . shall not, directly or indirectly, purchase or be interested in the purchase of any part of the real estate so sold. All sales made contrary to the provisions of this section shall be void."

Where one purchases land in violation of a statute and has the title conveyed to another to evade that statute, there is no resulting trust in favor of the purchaser. *Miller v. Davis,* 50 Mo. 572; *Ottley v. Browne,* 1 Ball & B. 360; 1 Perry, Trusts (6th ed.) § 165 and cases; Godefroi, Law of Trusts (3d ed.) p. 240 and cases. A case in point is *Higgins v. Higgins,* 55

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Mo. 346. See, also, *Leggett v. Dubois,* 5 Paige, 114; 2 Story, Eq. Jur. (12th ed.) § 1201*b*.

As was said in *Sell v. West,* 125 Mo. 621, 28 S. W. 969, a similar case: "Courts of equity have no more right than courts of law to act upon crude notions of what is right in the particular case without reference to established rules and precedents."

2. We have also in this state a statute reading as follows (sec. 2077, Stats. 1898):

"When a grant for a valuable consideration shall be made to one person and the consideration thereof shall be paid by another, no use or trust shall result in favor of the person by whom such payment is made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section."

The next section provides that such conveyance shall be presumed fraudulent as against creditors of the person paying the consideration, and that a trust shall result in favor of such creditors. See *Hamilton v. Wickson,* 131 Mich. 71, 90 N. W. 1032; *Chantland v. Midland Nat. Bank,* 66 Kan. 549, 72 Pac. 230; *Garfield v. Hatmaker,* 15 N. Y. 475; *Baker v. Bliss,* 39 N. Y. 70; *McPherson v. Featherstone,* 37 Wis. 632.

The effect of this last quoted statute in the instant case is to supplement the first rule stated. The bar of the second quoted statute would not be uplifted by a showing on the part of the respondent of her forbidden transaction with the purchaser at the sale.

3. We have also sec. 2304, Stats. (1898), which requires every contract for the sale of any lands or any interest therein to be in writing, expressing the consideration, and subscribed by the party by whom the sale is to be made. The effect of these statutes and precedents is sought to be obviated in the majority opinion by considering the foregoing facts sufficient to support a counterclaim by the respondent for specific performance of the oral contract mentioned. No such relief was

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awarded by the judgment appealed from, but waiving that objection we come to the following: Equity cannot disregard the positive mandate of the statute in a specific performance action. *Bogan v. Camp,* 30 Ala. 276; *Kreamer v. Earl,* 91 Cal. 112, 27 Pac. 735; *Volney v. Nixon,* 68 N. J. Eq. 605, 60 Atl. 189.

An executory contract prohibited by statute cannot be enforced. *Ætna Ins. Co. v. Harvey,* 11 Wis. 394, and cases cited; *Clarke v. Lincoln L. Co.* 59 Wis. 655, 18 N. W. 492; *Menominee River B. Co. v. Augustus Spies L. & C. Co.* 147 Wis. 559, 132 N. W. 1118. It is apparently thought that notwithstanding the mandatory terms of the statute first quoted, because this court has construed the word "void" there to mean voidable when applied to an executed conveyance, that this makes some difference. I do not think it does. Many contracts void while executory and incapable of enforcement are after execution voidable only at the instance of a person who is aggrieved by the infraction of the statute. Such is the statute of Elizabeth avoiding conveyances in fraud of creditors, and the statute of frauds, and many others. The refusal of courts to enforce executory contracts like that in the instant case does not turn upon that question at all. I think one would have to search far to find a precedent in addition to the instant case where a court held an executory contract prohibited by statute enforceable in specific performance. To do so is to annul the statute and to hold that a court of equity will enforce that which the statute forbids. It seems to me entirely fallacious to employ the distinction between "void" and "voidable," sometimes properly made, for the purpose of upholding and enforcing an executory contract prohibited by statute. If these views are correct the undisputed evidence left the defendant estopped by her own deed to claim title to the land in question. *Renfrew v. McDonald,* 11 Hun, 254; *Phillips v. Wooster,* 36 N. Y. 412; *Pride v. Andrew,* 51 Ohio St. 405; *Murphy v. Hubert,* 16 Pa. St. 50; *Broughton*

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v. Broughton, 4 Rich. Law (S. C.) 491; *Fargo v. Ladd,* 6 Wis. 106, and cases in Shepard's Annotations; *Milwaukee T. Co. v. Lancashire Ins. Co.* 95 Wis. 192, 70 N. W. 81.

4. With reference to supporting a defense of this kind against the grantee by the grantor without legal title but in possession, see cases in Wait on Fraudulent Conveyances (3d ed.) § 402, and the whole of ch. XXVI of that book.

HUNTINGTON, Executor, Appellant, vs. BURDEAU, Respondent.

March 12—April 23, 1912.

Appeal: Review: Findings of fact: Partnership: Oral contract: Statute of frauds: Executed transactions: Accounting: Receivers.

1. The superior advantages of a referee to judge of the credibility and weight of the evidence entitle his findings to peculiar force in a case where the evidence is vague, uncertain, and susceptible of conflicting constructions or applications.
2. Although an oral agreement to conduct partnership dealings in lands is void under the statute of frauds, yet where such contract has been fully executed by the parties, or fully executed as to certain separable and independent transactions, so that nothing remains to be done but to ascertain the money balance due from one partner to the other, it is, as to such completed transactions, not within the statute, and equity will entertain an action between the partners for an accounting.
3. In such an action the court cannot appoint a receiver in respect to alleged assets of the partnership remaining unconverted, since to do so would be to execute a void contract.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Modified and affirmed.*

The complaint in substance alleges that on or about the 1st day of October, 1903, the plaintiff and the defendant formed a partnership for the purpose of buying and selling

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real estate in and around Brown county, Wisconsin, under an agreement that the plaintiff should contribute one half of the money needed for various deals that should arise, and that the defendant should pay the other half; that the parties co-operate in the care and labor of the business, and that the plaintiff should receive one half of the net profits, to be divided after each deal was completed; that all lands were to be purchased for speculation only and not for personal or individual purposes; that said plaintiff and defendant entered upon, and have ever since continued to carry on, said partnership business under and in pursuance of said agreement; that since the commencement of said partnership the defendant has from time to time applied to his own use from the receipts of said business large sums of money, greatly exceeding the proportions thereof to which he was entitled as his share, and has never accounted for said moneys to this plaintiff, although he was frequently demanded so to do; that the defendant has received the sum of $750 over and above his due proportion of the partnership profits, and that he continues to appropriate this money to his own use.

The relief asked for by the plaintiff is (1) that the said copartnership may be dissolved and an account be taken of all the copartnership dealings and transactions from the commencement thereof, and of the moneys received and paid by plaintiff and defendant, respectively, in relation thereto; (2) that the property of the copartnership be sold and divided between the plaintiff and defendant; (3) that in the meantime the defendant be enjoined from collecting and receiving, or from in any manner interfering or intermeddling with, or disposing of, the partnership money or property; (4) that a receiver of the partnership moneys and property be appointed with the usual powers and duties; and (5) for such other and further relief as may be just and equitable, together with the costs and disbursements of this action.

The answer alleged (1) that between the 1st day of Octo-

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ber, 1901, and the 1st day of May, 1904, plaintiff and defendant purchased five pieces of property together for the purpose of sale, each agreeing to contribute one half of the purchase price and to divide equally the profits to be earned after paying all expenses incidental to the holding and sale thereof; that said pieces of property were as follows: Crook's farm; Twilliger farm; Boetker farm; Roberts farm (also known as the Zimball farm); and Styres farm; (2) that defendant never entered into any general partnership with the plaintiff to carry on the sale of real estate or for the purpose of carrying on business, and that the above transactions were distinct and separate transactions; (3) defendant, further answering plaintiff's complaint, alleges that he has fully paid plaintiff all moneys coming to him from defendant and that he is not indebted to him in any sum whatever; (4) except as so admitted defendant denies each and every allegation contained in plaintiff's complaint.

The answer then set out four counterclaims, of which the third only is material to the issues, and that was for goods, wares, and merchandise sold and delivered to the plaintiff at his special instance and request, and upon which the defendant recovered the sum of $421.20. The action was begun and tried during the lifetime of the plaintiff William Cook, but final judgment was not rendered till after his death. The case was referred to Carlton Merrill, Esq., to hear, try, and determine. The referee filed three separate reports, the last one being dated September 17, 1909. In that report the referee thus states the partnership account, for convenience, as against *Burdeau:*

"W. E. Burdeau in account with William Cook.	Dr.
To amt. due Cook on Twilliger-Boetker deal	$981 49
To am. due Crook	513 17
" " Zimball (Roberts)	165 37
" " Boulet	49 00
" " Styres	271 62
" " Cheese factory deal	25 00
Total	$2,005 65

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	Cr.	
By cash	$1,000 00	
"	252 70	
"	100 00	
"	168 50	
Due from Cook on Wittold deal	191 00	
	$1,712 20	$1,712 20
Balance due from Burdeau to Cook on partnership matters		$293 45
Due to Burdeau from Cook on third counterclaim		$421 20
Due Cook on partnership matters		293 45
Balance due Cook to Burdeau		$127 75

The plaintiff would be entitled to the appointment of a receiver to take possession of the mortgage of $450 on the Styres land—the Smith land contract for $400, and the four lots in Cady & Burdon's Addn. to convert them into money, pay first the balance of $127.55 due Burdeau and divide balance between Cook and Burdeau equally."

The court confirmed the report of the referee dated July, 1909, wherein the referee found that there was due defendant from the plaintiff on the third counterclaim the sum of $421.20, and that there was nothing due on the partnership account for the reason that the agreements for the purchase and sale of real estate, being in parol, were void, and that neither party was bound to account for the proceeds or profits thereof, and it disregarded the report dated September 17, 1909. From a judgment entered in favor of the defendant on his third counterclaim in the sum of $421.20, together with costs and disbursements, and dismissing plaintiff's complaint on the merits, the plaintiff appealed.

Sol. P. Huntington, for the appellant.

For the respondent there was a brief by *Kittell & Burke,* and oral argument by *J. A. Kittell.*

VINJE, J. Each side takes exceptions as to the correctness of the referee's findings contained in the last report dated September 17, 1909, claiming the referee erred in the allowance

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of both credit and debit items. In his second report the referee said:

"The plaintiff and defendant are uncle and nephew. For years they have lived in the same neighborhood in the town of Suamico, apparently on the most friendly terms. *Burdeau* ran a general store where Cook got his household supplies, etc., on running account. There were during the same period covered by the matters in controversy, dickers, dealings, and joint speculations between them other than those involved in this suit, in which considerable money passed between them from hand to hand. Except the store book account and some memoranda made by *Burdeau* in a little pocketbook, there seems to have been no account kept of their dealings. They both testify much from memory as to happenings of several years past. It is probably beyond human power to determine exactly what is equitably due one to the other. The evidence is meager in exact dates and in description of property, and in many instances wanting entirely; but the dealings took place between October, 1901, and the commencement of this action."

In view of the situation of the parties and the state of the evidence it is not surprising that both sides excepted to the findings made. We have carefully examined the evidence and are satisfied it warranted the characterization given it by the referee. The findings made are all supported by evidence, and we cannot say there is such a clear preponderance thereof against any finding as to warrant us in setting it aside. The superior advantages of the referee to judge of the credibility and weight of the evidence is peculiarly applicable to a situation like the one before us where the evidence is vague, uncertain, and susceptible of conflicting constructions or applications.

The really important question on this appeal is whether or not the court erred in holding that plaintiff could not be credited with the amount of $293.45 found due him on the partnership deals in lands on the ground that the contract to deal in them was oral and so void under the statute of frauds.

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That an oral agreement to conduct partnership dealings in lands is void under the statute of frauds (sec. 2302, Stats. 1898) was held by this court as early as *Bird v. Morrison,* 12 Wis. 138, and has been steadily adhered to since. *Clarke v. McAuliffe,* 81 Wis. 104, 51 N. W. 83; *McMillen v. Pratt,* 89 Wis. 612, 62 N. W. 588; *Seymour v. Cushway,* 100 Wis. 580, 76 N. W. 769; *Smith v. Putnam,* 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288; *Scheuer v. Cochem,* 126 Wis. 209, 105 N. W. 573; and *Langley v. Sanborn,* 135 Wis. 178, 114 N. W. 787.

In the case of *Bird v. Morrison, supra,* plaintiff sought to establish an equitable interest in lands purchased by his partner, Morrison, under an oral agreement that they were to have equal interests therein. The court was asked to declare that one half of the legal title held by Morrison's grantee—the trial court having found he purchased with notice—was held in trust for the plaintiff. The judgment asked affected title to land. In *Clarke v. McAuliffe, supra,* the action was for an accounting of partnership matters, for a dissolution of the partnership, and for recovery of one half the profits of the purchase and sale of a piece of land. It was alleged that defendant took title in his own name, sold it at a profit of $23,000, and plaintiff sought to recover, among other things, his share of the profits. The court held that he could not, because the agreement to buy for joint profit was oral, and void under the statute, and defendant had at all times repudiated it and had at no time paid any portion of the profits over to the plaintiff. In *McMillen v. Pratt, supra,* it was held that an action at law could not be maintained for damages for breach of an oral agreement for a partnership for the purchase of standing timber or lands. The court said:

"It is not material to consider what remedies may be had in a court of equity where there has been a part performance of such an agreement, or in actions of fraud or deceit in reference thereto, for at law neither party has any standing to

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recover damages against the other for a breach of such an agreement."

The case of *Seymour v. Cushway,* 100 Wis. 580, 76 N. W. 769, was an action to have a trust declared in certain standing timber, the legal title to which had been conveyed to the defendants, and in the profits derived by them from the business of manufacturing it into lumber, and, as it appeared there was no fraud and nothing more than a mere breach of the oral contract to enter into and perfect the proposed partnership and purchase, equity refused to enforce it. In *Scheuer v. Cochem,* 126 Wis. 209, 105 N. W. 573, the court distinguished the case from *Smith v. Putnam,* 107 Wis. 155, 82 N. W. 1077, 83 N. W. 288, on the ground that the oral agreement had not been sufficiently carried out so that it could be treated as an executed contract, as was the latter case, where nothing was left to be done but the ascertainment of a money balance due from one partner to another. The case of *Langley v. Sanborn,* 135 Wis. 178, 114 N. W. 787, was for damages for breach of an oral contract to conduct partnership dealings in land.

It will thus be seen that in each of the above cases, except *Smith v. Putnam,* either a trust in lands or the proceeds thereof was sought to be declared, or the oral agreement was wholly or partially unexecuted, or damages were sought for its breach. In each case the court was asked to give force and effect to the void oral agreement to an extent at least further than the parties had recognized it even where there was a partial execution of it. In the case of *Smith v. Putnam* it was held that where the parties had so far completed all the transactions as to leave nothing necessary to be done by the court but the ascertainment of a money balance due from one party to the other, the void contract would be treated as a fully executed one, and therefore not within the purpose or scope of the statute. The cases of *Bird v. Morrison,* 12 Wis. 138; *Clarke v. McAuliffe,* 81 Wis. 104, 51 N. W. 83; *McMillen v.*

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Pratt, 89 Wis. 612, 62 N. W. 588, and *Seymour v. Cushway,* 100 Wis. 580, 76 N. W. 769, were cited and approved by this court in *Smith v. Putnam.* But it was there said:

"In applying the statute of frauds, courts long since recognized an exception, or more properly a distinction, in cases where a contract void by the statute had been fully executed, and one party sought to retain the fruits of the dealing in defiance of his promises. Such situation was declared to be not within the purpose of, and so not sheltered by, the statute. It has therefore been held in a vast array of decided cases that where the parties have fully executed all parts of such a contract relating to or affecting interests in land, so that the courts do not need to enforce anything with reference to the land itself, the rights and duties of the parties resulting from their dealings may be enforced, and each of them prevented from using that statute, not as a protection against, but as an effective means of, fraud. Browne, Stat. Frauds, § 116; *Rice v. Roberts,* 24 Wis. 461; *Niland v. Murphy,* 73 Wis. 326, 41 N. W. 335; *Pireaux v. Simon,* 79 Wis. 392, 48 N. W. 674; *Trowbridge v. Wetherbee,* 11 Allen, 361; *Bowen v. Bell,* 20 Johns. 338; *Remington v. Palmer,* 62 N. Y. 31; *Bork v. Martin,* 132 N. Y. 280, 30 N. E. 584; *Hodges v. Green,* 28 Vt. 358; *Gordon v. Tweedy,* 71 Ala. 202; *Negley v. Jeffers,* 28 Ohio St. 90; *Galley v. Galley,* 14 Neb. 174; *Ryan v. Tomlinson,* 39 Cal. 639, 645; *Bibb v. Allen,* 149 U. S. 481, 497, 13 Sup. Ct. 950."

In the case at bar all partnership transactions, except those relating to the mortgage of $450, the land contract for $400, and the lots yet unsold, are completely closed up, and nothing remains to be done but to ascertain the amount due thereon from one partner to the other. These transactions, too, like those in the *Smith Case,* are entirely independent and separate from those not yet fully executed. The answer alleges that each deal was a separate and distinct transaction. The defendant paid plaintiff from time to time at least a portion of the profits of each deal. He claims he paid plaintiff all the profits due him on all the deals. We have, therefore, as to the deals fully closed, a case exactly similar to *Smith v.*

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Putnam, namely, the mere determination of the correct amount due each partner on deals otherwise fully executed. Plaintiff claims he has not been paid the correct amount, and the defendant claims he has. In *Smith v. Putnam* it was held that such a situation took the void agreement out of the statute, and it was further held that, in the absence of seasonable objections, the partnership account could be stated in an action at law. Here the action was brought in equity and a partnership admitted as to each of the five separate deals.

We conclude, therefore, that the trial court erred in refusing to deduct from the amount found due the defendant on his counterclaim, to wit, the sum of $421.20, the sum found due the plaintiff on the deals fully closed, to wit, the sum of $293.45.

The court cannot appoint a receiver to take charge of the mortgage, land contracts, and lots unsold. To do so would be to execute a void contract. As to those deals the parties must be left where they are.

By the Court.—Judgment modified by deducting therefrom as of the day of its rendition the sum of $293.45, and, as so modified, affirmed, with costs in favor of the appellant.

BOGUE and others, Executors, Respondents, vs. LAUGHLIN, Treasurer, and the VILLAGE OF POYNETTE, Appellants.

March 14—April 23, 1912.

Taxation: Omitted property: Reassessment against executors after death of owner: Constitutional law: Evidence: Burden of proof: Notice: Waiver: General appearance before board of review: Tax as a debt: Filing claim against estate: Pleading: Counterclaim: Judgment against executors.

1. In an action to restrain the collection of a tax entered against executors upon a reassessment of property of a decedent omitted from the tax rolls of previous years, the burden is upon the

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executors to show whether the property so reassessed was omitted property or merely undervalued property, since the tax roll is under the statute *prima facie* evidence of the justice and regularity of the tax.

2. One who appears generally before a board of review in response to a notice issued by such board cannot afterwards object that such notice was not a six days' notice as required by statute.
3. Sec. 1059, Stats. (Supp. 1906: Laws of 1899, ch. 50), and secs. 1044–1044*d* (Supp. 1906: Laws of 1903, ch. 417), authorized the property of a decedent, which had been omitted from assessment in previous years during his lifetime, to be assessed against his personal representatives.
4. It is sufficient to justify such an assessment that the personal representatives have in their possession on May 1st personal property subject to taxation, and it is not necessary that it should be the identical property omitted or that the proof should show what specific items were omitted in the previous years. *Hayden v. Roe*, 66 Wis. 288, distinguished.
5. Under the law as it has existed since 1903 (Laws of 1903, ch. 417), the tax or liability for a tax on personal property is a legal charge against the owner.
6. The statute authorizing the assessment of omitted property against representatives of a deceased person is constitutional.
7. The statute gives ample power to assess the omitted property against the personal representatives, and the tax then becomes their debt, though with the power to reimburse themselves out of the estate, and there is no necessity to present such tax in county court as a claim against the estate.
8. An assessment which, from the whole record, was evidently intended to be made against executors, is sustained as such, though somewhat lacking in form.
9. Where an action is brought by executors of a deceased person against a village and its treasurer to restrain the collection of taxes assessed against such executors, defendants may counterclaim for the amount of the tax, and it is immaterial that the prayer is for judgment against plaintiffs personally. The judgment on such counterclaim against the executors should be in form *de bonis testatoris*.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

This action was brought to restrain the collection of a tax levied in 1907 for the years 1904, 1905, and 1906 upon property alleged to have been omitted from the roll in such years,

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and determine its validity, and recover possession of personal property seized under a warrant for the collection of such tax, prevent the commencement of other actions for the collection of the tax, and for general relief. The defendants answered by admissions and denials of the allegations of the complaint, and also by way of counterclaim set up the proceedings resulting in assessment of the tax upon the property omitted for the years in question. There was a reply to the counterclaim.

The court found that Hugh Sloan was a resident of the village of *Poynette* during the years 1904, 1905, and down to October 23, 1906, on which date he died; that thereafter his will was duly proved and allowed in the county court, and in December, 1906, letters testamentary thereon were duly issued out of said court to the plaintiffs, *Allan Bogue, Wm. Dunlop,* and *Chas. Mair,* who ever since have been and now are acting as executors of said estate; that said executors have at all times since their appointment resided within the village of *Poynette;* that said Hugh Sloan made to the several assessors of said village for each of the years 1904, 1905, and 1906 his sworn statement of valuation of the net average amount of money and credits owned by him in each of these years, other than debts secured by mortgages or conveyances of real estate, as follows: 1904, $5,500; 1905, $5,500; 1906, $5,000; that said statement was in a gross sum and not itemized, and constituted in each instance a gross and fraudulent omission and misstatement thereof to the knowledge of deceased; that said Hugh Sloan was not required by assessors to give and did not give said assessors or the several boards of review for said years, any statement of any particular items of which his said property was composed, nor any list of securities owned by him; that no other statement was required of him in either of said years; that the several assessors of said village placed said several amounts upon the assessment rolls of said village in said years and assessed and valued the same as the net average of moneys and credits of said Hugh Sloan liable to taxation for said years; that said statements

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of money and credits for said several years were received by said assessors and no change made therein by said boards of review; that thereafter said amounts were spread upon the assessment and tax rolls of said village for said years respectively, as the net average amount of money and credits of said Sloan other than mortgages exempt from taxation; that said Sloan paid all taxes thereon in due season for the years 1904 and 1905, and the executors of his estate paid the tax thereon for the year 1906.

The court further found that on May 1, 1907, the plaintiffs as such executors had in their possession in said village the personal property belonging to the estate of said Sloan, no distribution thereof having been then made; that the time for presenting claims against the estate of said Sloan was limited to June 10, 1907; that the time fixed for hearing claims against said estate was June 11, 1907; that no claims were then presented to the county court against said estate; that in the year 1907 said executors made to the assessors of the village a statement of the value of the net amount of money and credits of said estate in their hands liable to taxation at $14,000; that they made no statements of property formerly owned by said Sloan liable to assessment in the years 1904, 1905, and 1906, and were not asked to make any such statements; that on June 25, 1907, the board of review of said village caused to be served upon said executors a notice to appear before said board on June 28th; that said executors appeared on said day and at several subsequent meetings of the board, and discussion of the matters of assessment and alleged "back taxes" was had; that on July 25, 1907, the executors were notified in writing that the board would be in session July 26, 1907, to hear evidence relating to the true value of the Sloan estate, for which it is liable to assessment for the years 1904, 1905, 1906, and 1907; that at the meeting of the board of review July 26, 1907, various persons, including two of the executors, were examined; that the executors offered no proofs as to the actual taxable credits of deceased or his

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indebtedness during any of said previous years; that one of the executors declined to be examined except as to his own indebtedness to the estate; that on August 1st another meeting of the board was held, at which one of the executors was sworn; that at the conclusion of the meeting a motion was made by a member of the board that "by the evidence that is before us in regard to the Hugh Sloan estate, the assessor place upon the assessment roll against the executors (naming them) on which taxes have not been paid, for the year 1904 $12,240, and for the year 1905 $16,895, and for the year 1906 $20,495, and also raise the assessment for the year 1907 $12,500;" that on August 2, 1907, a notice was served on plaintiffs informing them that the board "had found and determined the fact to be that said estate should be assessed upon like account (the value of net amount of moneys, accounts, credits, etc.) for omissions for the year 1904 $12,240, for 1905 $16,895, and for 1906 $20,495," and that the executors might be heard respecting the same; that at the meeting of August 3d the plaintiffs appeared and asked for an adjournment, but were refused, and the board adjourned *sine die* that day; that thereafter the assessor entered the assessments upon the assessment roll of said village for 1907, in the column headed "moneys, accounts, credits, bonds, and other securities after deducting *bona fide* debts," in the following form:

	Net amount of moneys, credits, accounts, bonds, notes and other securities after deducting *bona fide* debts.
Chas. Mair, W. Dunlop, and *Allan Bogue,* executors of the estate of Hugh Sloan.	Value as fixed by board of review June 28, 1907, $25,000.

"The value of June 28, 1907, was made arbitrarily and not upon evidence. The board of review, after taking the testimony of witnesses and be-

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ing informed as to the facts, and after due consideration of the same, determined and fixed the valuation for the year 1907 at the sum of..... $26,500

And in accordance with their findings, such sum is entered here accordingly.

Upon like evidence, and upon knowledge of the facts, and upon due consideration, the board has found and determined the fact to be that said estate should be assessed upon like accounts for omissions for the year 1904..... 12,240

and for the year 1905..... 16,895

and for the year 1906..... 20,495"

The court further found that no assessment for the year 1907 or preceding years was entered by the assessor prior to the meeting of the board of review; that taxes were extended upon the tax roll of said village for the year 1907 against said assessed valuation omitted property as follows:

For the year 1904.....	$117 25
For the year 1905.....	264 57
For the year 1906.....	393 50
And for the property of said estate for 1907.....	429 56

That no claim for the taxes in question was filed in the county court against said estate, except that on December 26, 1907, a petition for this payment under sec. 1044*d* of the Wisconsin Statutes was filed in county court by defendants, which petition was heard by the court January 14, 1908, and denied on the ground that said section had no application to the facts in the case, the deceased and the executors having at all times been residents of the same taxing district and the property of the estate was in the possession of the executors therein.

That no appeal was taken by the defendants from said order dismissing said claim; that defendant sued an alternative writ of *mandamus* out of this court [the circuit court], requiring the county court to act upon said petition or show cause to the contrary; that the county court made return to said writ and this court quashed said writ upon said return

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showing that the county court had decided the matter upon said petition; that no appeal was taken from the judgment quashing said writ; that thereafter and on February 25, 1908, the defendant treasurer began a suit in this court to recover of the plaintiffs the taxes upon said assessments, which suit is still pending, though no complaint has been served; that on the same day on which service of summons in said mentioned suit was made, but after service of summons therein, the defendant treasurer made a levy under his tax warrant on the following personal property, to wit: from said *Allan Bogue,* one organ, which was not the property of said *Bogue,* but belonged to his daughter; from *W. Dunlop,* one horse, one buggy, one cutter, belonging to said *Dunlop* individually; that none of said property so seized had ever belonged to Hugh Sloan or his estate; that the property so levied upon was of the value of about $400; that one of said executors had at that time personal property of his own within reach of said treasurer to the amount and value of $2,000.

That thereupon said treasurer advertised said property so levied upon for sale at auction to pay said taxes; that further levies were threatened by said treasurer and the attorneys who were then acting for him; that said executors had at all times after their appointment sufficient personal property belonging to said estate in their hands to pay all said taxes; that before January 1, 1908, said executors duly tendered to defendant treasurer the amount of tax levied for the year 1907; that he refused to receive said money and said tender has been kept good, and the amount of said tax paid into court by the plaintiffs; that there is no evidence that said executors had in their possession on May 1, 1907, any of the same money, notes, credits, or securities that said Hugh Sloan owned in the years 1904, 1905, and 1906.

That after their appointment said executors filed an inventory in said county court in the matter of the estate of said Sloan, which showed personal property in the form of moneys

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in bank and promissory notes aggregating $31,321, all except $2,000 being of a taxable nature; that there is no evidence as to what specific items of personal property of said Sloan were omitted from assessment in 1904, 1905, or 1906.

That said Sloan during the years in question had no active business; he had retired, and did no work; that in addition to the suits already commenced by the defendants and levies made by them at the time of the commencement of the action, other suits and proceedings for the collection of said taxes were threatened by defendants, unless said taxes for 1904, 1905, and 1906 were paid.

And the court concluded that the board of review of said village intended to and did assess said sums as omitted property of the estate of said Sloan against the executors aforesaid; that the board of review of the village of *Poynette* for the year 1907 had no authority to levy an assessment against the plaintiffs for omitted property of said Sloan for the years 1904, 1905, and 1906; that the proceedings had by said board in that regard are illegal and of no force and effect; that plaintiffs are entitled to judgment perpetually restraining the defendants from enforcing the collection of said assessment for alleged omitted property; that plaintiffs are only entitled to such costs as are taxable in law actions, less the amount of costs taxable to said executors upon dismissal of the action begun by defendants February 25, 1908.

Judgment was entered accordingly in favor of plaintiffs adjudging void the assessment made in 1907 levying taxes for the years 1904, 1905, and 1906, and enjoining collection thereof, and for costs, from which judgment defendants appealed.

Daniel H. Grady, for the appellants, cited, *inter alia,* 27 Am. & Eng. Ency. of Law (2d ed.) 701; *Saint v. Welsh,* 141 Ind. 382, 40 N. E. 903; *Graham v. Russell,* 152 Ind. 186, 52 N. E. 806; *Reynolds v. Bowen,* 138 Ind. 434, 36 N. E. 756; *State ex rel. Davis & S. L. Co. v. Pors,* 107 Wis. 420,

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425, 83 N. W. 706; *Warden v. Fond du Lac Co.* 14 Wis. 618, 620; *Peters v. Myers,* 22 Wis. 602; *Flanders v. Merrimack,* 48 Wis. 567, 4 N. W. 741; *Sturges v. Carter,* 114 U. S. 511, 518, 5 Sup. Ct. 1014; *Appeal of Seaman,* 135 Iowa, 543, 113 N. W. 354.

For the respondents there was a brief by *Rogers & Rogers* and *H. E. Andrews,* and oral argument by *H. B. Rogers.* They contended, *inter alia,* that the taxes for the years during which the property was claimed to have been omitted were not a lien or charge against the estate. *Evans v. Sharp,* 29 Wis. 564; *Simmons v. Aldrich,* 41 Wis. 241, 251; *Plumer v. Marathon Co.* 46 Wis. 163, 181, 50 N. W. 416; *Flanders v. Merrimack,* 48 Wis. 567, 572, 4 N. W. 741; *State ex rel. Davis & S. L. Co. v. Pors,* 107 Wis. 420, 425, 83 N. W. 706; *State ex rel. Vossen v. Eberhard,* 90 Minn. 120, 95 N. W. 1115. There was no proper assessment against the respondents as executors; the attempted assessment was against the estate. *Fond du Lac v. Estate of Otto,* 113 Wis. 39, 88 N. W. 917; *Hayden v. Roe,* 66 Wis. 288, 28 N. W. 186; 1 Desty, Taxation, 334; *State v. Collector,* 39 N. J. Law, 79; 1 Cooley, Taxation (3d ed.) 665, 666; *Dresden v. Bridge,* 90 Me. 489, 38 Atl. 545; *Sweetsir v. Chandler,* 98 Me. 145, 56 Atl. 584; *Eliot v. Prime,* 98 Me. 48, 52, 56 Atl. 207; *Wood v. Torrey,* 97 Mass. 321; *Cook v. Leland,* 5 Pick. 236; *Williams v. Holden,* 4 Wend. 223.

Kerwin, J. Aside from some questions of practice, which will be referred to later, the main points raised by the assignments of error are: (1) Whether there was any property in the possession of the plaintiffs May 1, 1907, owned by Sloan in 1904, 1905, and 1906. (2) What items of property, if any, were omitted in said years? (3) Could there be a lawful reassessment of taxes in 1907 upon property alleged to have been omitted in 1904, 1905, and 1906, against the representatives of deceased? (4) Whether, if there was a valid tax, re-

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covery could be had only by filing claim in county court. (5) Was there a proper assessment against the plaintiffs as executors?

The material facts appear from the findings, which are set out in the statement of the case.

1. On propositions 1 and 2, as to whether there was any property owned by Sloan and omitted from the tax roll in 1904, 1905, and 1906 in the possession of the plaintiffs May 1, 1907, and the amount thereof, we think the omitted property was properly assessable against the executors, under existing statutes, though not in possession of the executors May 1, 1907. Sec. 1044*b*, Stats. (Supp. 1906), makes the tax roll *prima facie* evidence of the justice and regularity of the tax; hence the burden was upon plaintiffs in all respects, and especially in this case on the question whether the property so reassessed was omitted property or merely undervalued property. No evidence was offered tending to show that it was undervalued property, hence we must hold it was omitted property, because the contrary does not appear. There is no showing whatever, and no effort was made by the executors to show, that the property assessed as omitted property was not in fact omitted property, although they were before the board on notice several times between the 28th of June, 1907, and the 3d day of August, 1907, at which times the matter of the assessment of "back taxes" on the Hugh Sloan estate for 1904, 1905, and 1906 was considered, as will appear from findings set out in the statement of the case. On August 2, 1907, notice was served upon plaintiffs to the effect that the board of review had found and determined to assess for omissions in 1904, 1905, and 1906, and specifying the amount in each year, and that the executors, plaintiffs, might be heard respecting the same. The plaintiffs appeared on August 3, 1907, and asked for an adjournment, which was refused. Counsel for respondents insists that this notice was not sufficient because it did not give six days' notice as required by

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statute. This objection is not tenable, since the plaintiffs appeared generally before the board in obedience to the notice. It is insisted by appellants that the evidence offered and received before the board of review on the part of defendants was ample to show that the property entered by the board was omitted property during the years in question. But regardless of this evidence, in the absence of any showing on the part of plaintiffs the *prima facie* case made by the assessment and tax rolls was sufficient. Sec. 1044*b*, Stats. (Supp. 1906: Laws of 1903, ch. 417). We conclude that the property assessed and entered upon the rolls for the years mentioned must stand as property of Sloan, deceased, omitted in said years.

2. The court below erroneously held and concluded that there could be no assessment of omitted property against the executors of a deceased person, on the ground that there is no statutory authority for such assessment, basing its judgment mainly upon *State ex rel. Ashland W. Co. v. Wharton,* 115 Wis. 457, 462, 91 N. W. 976; *Ashland Co. v. Knight,* 129 Wis. 63, 108 N. W. 208; *State ex rel. Vossen v. Eberhard,* 90 Minn. 120, 95 N. W. 1115. The foregoing Wisconsin cases merely go to the point that statutory authority is necessary to support a "back tax" assessment. This may be conceded, because we think our statutes are sufficiently broad to warrant the assessment of "back taxes" against the personal representatives of a deceased person, upon property of deceased which escaped taxation, when the personal representatives have personal property in their possession belonging to deceased subject to taxation.

Sec. 1059, Stats. (Supp. 1906: Laws of 1899, ch. 50), plainly gives authority to reassess property "omitted from assessment . . . by mistake or inadvertence." But it is argued that this authority does not apply to cases where the property was omitted during the lifetime of a deceased person and justify assessment after his death; that the statute does not authorize an assessment against an heir or personal representa-

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tive having in his possession personal property of a decedent that escaped taxation during deceased's lifetime through omission from the tax roll. The Minnesota case (*State ex rel. Vossen v. Eberhard,* 90 Minn. 120, 95 N. W. 1115) is relied upon by respondents to support the judgment. This case rests upon sec. 1631, Gen. Stats. 1894 of Minnesota, which is similar to our statute (sec. 1059), and the Minnesota court grounds its decision upon the fact that, while the assessment is valid as to real estate, it is not valid as to personal property, because there is no personal obligation against the owner and the tax is not made a lien on the property. The court further says that there is a wise reason for the distinction, since it is the policy of the law to permit the free transfer and change of personal property. In *State ex rel. Davis & S. L. Co. v. Pors,* 107 Wis. 425, 83 N. W. 706, holding that an owner may be assessed for omitted personal property after he has ceased to be the owner, it is said:

"The principle at the foundation of these reassessment laws is that the owner of property is under obligation—some authorities say he is indebted—to the government to pay a sum proportioned to the property owned by him on May 1st of each year."

In other jurisdictions where the statute is no broader than ours, personal property omitted before the owner's death has been held assessable after his death. *Reynolds v. Bowen,* 138 Ind. 434, 36 N. E. 756, 37 N. E. 962; *Graham v. Russell,* 152 Ind. 186, 52 N. E. 806; *Comm. v. Sweigart's Adm'r* (Ky.) 73 S. W. 758; *Sturges v. Carter,* 114 U. S. 511, 5 Sup. Ct. 1014. It has also been held that even though a tax has not become a lien at the time of death, yet the fact that deceased had become personally liable to pay it when it should be levied made it a debt of decedent which could properly be paid by his executor out of his estate. 18 Cyc. 420; *In re Franklin,* 26 Misc. 107, 56 N. Y. Supp. 858.

In addition to sec. 1044, Stats. (Supp. 1906), which makes

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property assessable to executors or administrators, ch. 417, Laws of 1903, adding secs. 1044*a*, 1044*b*, 1044*c*, and 1044*d*, provides that when personal property shall be assessed to an executor or administrator the person so assessed shall be personally liable for the tax, but that he shall have a remedy over against the beneficial owner and a lien on such property. Sec. 1044*b* makes the tax a debt against the owner. Under the foregoing statutes and others relating to taxation in this state we are convinced that the board of review had authority to assess the omitted personal property after the death of Sloan.

True, the court below found that the plaintiffs did not have in their possession on May 1, 1907, any personal property owned by Sloan in 1904, 1905, and 1906, and that there was no evidence as to what specific items were omitted from assessment in 1904, 1905, and 1906. But, as we have seen, it was sufficient that the plaintiffs had in their possession May 1, 1907, personal property subject to taxation, even though not the identical property omitted. The instant case is unlike *Hayden v. Roe,* 66 Wis. 288, 291, 28 N. W. 186, relied upon by respondents, since in that case the administrator was appointed after May 1st of the year of the assessment, and counsel sought to hold the assessment valid under the rule that the title of the administrator related back so as to include property as of May 1st. In the instant case it is not denied but that the plaintiffs were qualified and acting executors before May 1, 1907. Counsel for respondents cite several Wisconsin cases from 29 to 107 Wisconsin inclusive, which they argue are to the point that under our statutes the tax or liability for the tax cannot be a charge against the owner. But it is plain that these decisions are not applicable to the present situation under the statutes as they have existed since 1903.

Counsel further argue that the statutes authorizing the assessment of omitted property against the representatives of a deceased person as in the instant case are unconstitutional and

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void. This contention is untenable. We conclude that the assessment was valid.

3. It is next claimed by respondents that, even if valid, it was necessary to file the claim against the estate before the expiration of the time limited for filing claims. Under the statutes heretofore referred to, ample power is given to assess against the executors, and they are bound to pay the taxes and reimburse themselves out of the estate in their hands. No reason appears why a different rule should apply in regard to omitted property and other property belonging to the estate, and in each case, under our statutes, the assessment is against the executors. As we have seen, the tax is a debt against the owner, the person assessed liable for the tax, but he has a remedy against the beneficial owner and a lien on the property and can reimburse himself out of the property in his possession. Ch. 417, Laws of 1903, and sec. 1061, Stats. (Supp. 1906).

Graham v. Russell, 152 Ind. 186, 52 N. E. 806, is against respondents on this contention. The court said, pages 193, 194:

"The contention of appellant's counsel, that the petition ought to have alleged that the taxes in dispute had been filed as a claim against Graham's estate prior to its final settlement, is without merit. The facts disclose that the decedent had for many years prior to his death failed to list and return for taxation a large amount of his property, and at his death it is charged he was liable for the payment of taxes, on account of his said default, in the sum of $3,000 and over, which had accrued and were due for state, county, and township purposes.

"Taxes are not such claims which the law of this state either requires or intends shall be filed for payment against a decedent's estate. It is true that taxes, in the order prescribed by the statute for the payment of liabilities of a decedent's estate, come within the fourth provision of such order of payment. . . . The duty, however, rests upon the ad-

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ministrator or executor to pay the taxes due against the estate without their being filed or presented for payment."

4. It is further contended by respondents that the assessment was not properly made against the plaintiffs as executors of the estate of the deceased. A great many cases are cited from this court, but they are cases decided when the statutes on the subject were quite different from the present statutes. True, the entry against the executors on the tax roll was not in as good form as might be, but under our present statutes we think it sufficient as an assessment against the plaintiffs as executors. It is quite apparent from the whole record that the board intended to make the assessment against the executors. Sec. 1044*a*, Stats. (Supp. 1906), provides that failure to enter such assessment separately or to indicate the representative capacity or other relationship of the person assessed shall not affect the validity of the assessment. We think the assessment was valid against the plaintiffs as executors of Hugh Sloan, deceased.

5. Several questions of practice respecting the sufficiency of the complaint in equity, and whether the plaintiff had an adequate remedy at law, and whether such objections were waived by failure to demur or answer, are argued in the briefs of counsel. But since we hold that no case was made either at law or in equity, it is unnecessary to consider or decide such questions.

6. The defendants set up a counterclaim asking judgment dismissing the complaint and that they have judgment against the plaintiffs for the sum of $1,204.88, being the amount claimed due for taxes, and for general relief, together with costs. On the trial defendants asked permission to withdraw the counterclaim, which was denied and the counterclaim was permitted to stand.

Ch. 417, Laws of 1903, before referred to, makes the tax collectible from the executors personally and also makes it a

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debt of the decedent. It being established that the taxes assessed against the plaintiffs are valid, judgment should have been entered in favor of the defendants for the amount of the debt. It is true that the counterclaim asks judgment against the plaintiffs—apparently a personal judgment. But this is immaterial under our system of pleading and practice. A judgment *de bonis testatoris* is a proper judgment in all cases where the executor is a party and the estate of decedent is liable for the debt. 18 Cyc. 1043 *et seq.; Woodward v. Howard,* 13 Wis. 557; *Hei v. Heller,* 53 Wis. 415, 10 N. W. 620; *Ladd v. Anderson,* 58 Wis. 591, 17 N. W. 320; *Borchert v. Borchert,* 141 Wis. 142, 123 N. W. 628. So in the present case judgment may be entered against the plaintiffs as executors, with direction that the same may be paid out of the property of the estate in the hands of the plaintiffs, since it appears from the record that there is ample property in the hands of the plaintiffs as executors to satisfy the claim.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to enter judgment in favor of the defendants upon the counterclaim as indicated in this opinion.

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PHŒNIX MANUFACTURING COMPANY, Respondent, vs. WHITE and wife, Appellants.
SAME, Appellant, vs. SAME, Respondents.

March 15—April 23, 1912.

Injunction: Contracts: Exclusive right to manufacture patented article: Parties: New contract superseding former one: Husband and wife: "Improvements" on patented machine: Right to use: Estoppel: Trade-names: Restraining use of man's own name: Unfair competition.

1. In an action to establish an exclusive right to manufacture and sell certain saw swages patented by defendant, and to enjoin him from manufacturing and selling similar machines in violation of his contract under which plaintiff claims, the defendant's wife, who is the record owner of the patent, is a proper, if not a necessary, party.
2. The inventor of a saw swage gave to a corporation, by contract, an exclusive right to manufacture and sell such swage, together with the inventions and improvements on the same which had been or might be invented. Afterwards the patent on the swage was formally transferred to the inventor's wife, but without consideration and without intention to make any practical difference in the ownership and control thereof by the husband. A new contract, signed by the wife and differing in some respects from the former one, was then made with the corporation, which in terms declared that it should supersede all other and former contracts respecting such swage. Thereafter the manufacture and sale went on as before, royalties being paid to the wife, with the husband's knowledge, and deposited to the credit of a bank account in her name, upon which, however, checks were drawn by husband and wife indiscriminately. *Held*, that the second contract was to all intents and purposes the contract of the inventor, so far as the corporation was concerned, and that it superseded the earlier contract.
3. A new saw swage invented and patented by the same inventor, but designated in the specification of the patent as an improvement on the former machine and so treated by the parties for a number of years, was an "improvement" covered by the contracts giving the corporation exclusive rights of manufacture and sale.

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4. The inventor having invented a third saw swage of similar character but with some changes, and the corporation having, after some discussion and negotiation, agreed that he might manufacture and sell such new swage himself, and having allowed him thereafter to proceed to make patterns and models in its shop at a considerable cash outlay, paid to it by him, with full knowledge of his intention to use such patterns and models in a shop of his own in manufacturing the new swage, the corporation was estopped from claiming any right, by virtue of its contract, to manufacture and sell such third swage.
5. A man's name is his own property and he has the right to every honest and fair use of it in his business, but he cannot resort to artifice or use it in such manner as to mislead the public in respect to the identity of another business firm or establishment or the article produced by it, and thus cause injury to such other beyond that which results from the mere similarity of name.
6. Thus, where a man named White invented a saw swage and granted to plaintiff the exclusive right to manufacture and sell the same and any improvements thereon, and plaintiff had, with his knowledge and consent, put such invention and an improved form thereof upon the market under the names of the "White Swage," "New White Swage," and "Improved White Swage," and had at great expense and by efforts extending over a number of years established a reputation and demand for the article, such inventor was properly enjoined, at the instance of the plaintiff and upon proof of actual injury to its trade by deception of customers, from advertising and selling another swage of his own later invention under such names or any combination thereof, including the name "New Improved White Swage." *Fish Bros. W. Co. v. La Belle W. Works*, 82 Wis. 546, explained and distinguished. SIEBECKER, KERWIN, and TIMLIN, JJ., dissent.

APPEALS from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Modified and affirmed.*

This is an action in equity to establish and enforce by injunction an exclusive right on the part of the plaintiff to manufacture and sell certain patented saw swages, invented and patented by the defendant *Albert E. White,* and to enjoin said *White* from manufacturing or selling any saw swage

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equipped with certain specified parts, and from advertising for sale any saw swage under the name "White Saw Swage," or any similar name. A saw swage is a hand machine used for spreading or broadening the cutting surface of the teeth of rotary, band, or other saws at the point and for a little distance below the point. This is done by placing the machine on the edge of the saw so that the tooth to be swaged comes between two steel dies, one of which is stationary and is called the anvil die, and the other is a movable eccentric die, both of which are set firmly in a circular steel block. By means of a lever the eccentric die is pressed with great force against the cutting surface of the tooth, the back of which rests against the anvil die, and thus the point of the tooth is broadened.

In November, 1896, the defendant *Albert E. White* had perfected an improved saw swage and applied for a patent thereon, which patent was actually issued to him August 3, 1897, and numbered 587,539, and is hereafter called the first patent. November 18, 1896, a contract was made between *White* and the plaintiff by which *White* granted to the plaintiff

"the exclusive right to manufacture and sell throughout the United States, its Territories and the Dominion of Canada, the said saw swages, together with the inventions and improvements on same which have been or may be invented, and for which letters patent are now pending or may hereafter be issued to him in the United States and the Dominion of Canada for improvements in saw swages and attachments thereto to the full end and term for which any patent may be issued thereon, subject to the limitations and conditions hereinafter named."

By this contract *White* also agreed as follows:

"faithfully to devote his services and skill as inventor to perfecting and completing the said invention and improvements and to use his best endeavors to introduce the same for sale and use and to make the same efficient and successful in operation, and to create the best possible demand and market

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for his said invention and improvements to the end and purpose that the manufacture and sale thereof may be made as profitable and extensive as he may do by the exercise of his best efforts and skill in that behalf.

"And the said *A. E. White* further agrees in consideration of this agreement and his salary hereinafter mentioned as the agent of the said party of the second part, and under its direction as workman and traveling salesman, to sell and introduce the saw swages and invention and improvements thereon and also any other articles of manufacture as requested by the said party of the second part, by the exercise of his best skill and ability as such workman, salesman or agent, and that he will faithfully devote his time, ability and services in and about the introduction and perfection of said invention and improvements thereon for the best interests of the business of said *Phœnix Manufacturing Company.*"

The contract further provided that the plaintiff should manufacture and sell the said patented swages and the improvements thereon, and pay a royalty to *White* of $5 for each swage sold; that the agreement might be canceled by either party by six months' written notice at any time; and that *White* should be employed as traveling agent and salesman by the plaintiff for one year at a salary of $1,000, subject to the right of either party to terminate the employment by giving thirty days' notice to the other.

Upon the making of this contract the plaintiff entered on the manufacture and sale of the machine, and successfully prosecuted the business and made regular payments of royalties to *White* as agreed. *White* also went to work under the contract, and continued to travel and make sales for the plaintiff with no formal renewal of the contract until July 30, 1899, at which time he quit such employment by mutual consent and went to Louisiana, intending to engage in the lumber business there, but abandoned that intention and returned to Eau Claire, and on September 5, 1899, resumed his employment with the plaintiff at an increased salary, and so remained until August 22, 1908, when he finally left. In August, 1899,

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White assigned his interest in the patent to one C. B. Daniels, then president of the plaintiff company, as security for moneys which it was expected that Daniels would advance to him to be used in the Louisiana business, but as no advancements were ever made, Daniels on September 7, 1899, at *White's* request, assigned the patent to the latter's wife, *Georgianna M. White.* Both assignments were made without consideration. On September 9, 1899, *Georgianna M. White* entered into a written contract with the plaintiff with reference to the future manufacture of the swage, which the plaintiff alleges was made at the request of and with the consent of *White. White* denies that the last named contract was made at his request, or that he had anything to do with it except to carry a message from the plaintiff to his wife about it. The court, however, found that it was made at *White's* request, and it was abundantly proven not only that the contract was made at his request, but that he conducted the negotiations, while his wife simply signed it because the patent stood in her name. This second contract, after reciting the issuance of the patent and its transfer to *Georgianna,* grants to the plaintiff the exclusive right to make and sell the swage, "together with the inventions and improvements on the same which are or may be invented or added thereon, and attachments thereof, to the full end of the term of said patent," subject to the conditions thereafter named. The contract further provided for the same royalty as before, and that the plaintiff would not manufacture or sell any other saw swage while manufacturing the *White* swage, and that in case it should not sell at least 100 each year, or at its option pay the contract royalty for 100, the said *Georgianna* might, at her option, terminate the license by six months' written notice. By the final clause of this agreement it was provided that it should "supersede and take the place of all other or former contracts or agreements made respecting said patented saw swages or improvements."

After the making of this contract the manufacture and

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sale of the swage by the plaintiff went on as before, and the royalties were paid by check to the order of *Georgianna M. White,* with the full knowledge and consent of *White. Mrs. White* testifies that the checks were all deposited to the credit of her account in the bank (*Mr. White* never having kept an account of his own), and that checks were drawn on that account by herself and her husband indiscriminately. *Mr. White* continued in the plaintiff's employment, his work being enlarged from time to time so as to cover the making of plans and specifications for mill outfits and getting orders for the same, but he incidentally also sold the swages. In the fall of 1904, and while still at work for plaintiff, he designed a new swage and applied for a patent thereon, which was finally issued to him April 3, 1906, numbered 816,695, and which will be hereafter called the second patent. The specification of this second patent declares that the "invention relates to devices for swaging the teeth of band, gang, and circular saws, and is designed as *an improvement over the swage device* shown and described in letters patent of the U. S. No. 587,539, issued to me August 3, 1897." In this second patent the dies were not changed, nor their operation, but there was added a frame so that the block containing the dies was supported on the edge of the saw, combined with a slotted semi-circular arch above the saw furnished with stop pins for regulating the distance to be traveled by the lever, which was forked so that the handle was directly above and in the plane of the saw, thus insuring a direct pressure instead of a one-sided pressure, as in the case of the former lever. After the perfecting of this second invention, it was manufactured by the plaintiff, advertised, and sold by and with the knowledge and consent of the defendant *White* as the "New White Saw Swage," and the same royalty was paid to *Mrs. White* on each of the improved swages as on the old. *White* claims that this use was permissive only, and under a verbal agreement with Mr. C. B. Daniels (now deceased), which contemplated a definite agreement

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in the future, but as Mr. Daniels died before the commencement of this action *Mr. White* was not allowed to give any evidence of such an agreement, and no other witness gave any such evidence.

The court found that the two *Whites* and the plaintiff, from October, 1904, until August, 1908, treated the swages covered by the second patent as merely an improvement on the swages covered by the first patent and as one of the improvements covered by the terms of the second contract; that relying on this understanding the plaintiff spent large sums of money, extensively advertised and catalogued both machines, describing the machines made under the second patent as "New White Swages" and "Improved White Swages;" that *Mr. White* himself knew of and wrote the introduction to the catalogue, and that the plaintiff had thus built up a trade, and such swages had become generally known to the trade throughout the United States and Canada as "White Swages," "New White Swages," and "Improved White Swages." It further appears by the testimony that in August, 1908, *White* invented another improved saw swage, and made application for a patent thereon, which application was still pending in the United States patent office at the time of the trial, though a patent had been granted thereon in Canada, March 1, 1910. In this third machine both dies are set in a different way in the block, and the eccentric die is of somewhat different shape, the slotted arch and pins and forked lever are used, and there are new adjustable spring brackets for supporting the frame of the machine on the saw teeth, also a pivoted guide. With regard to this invention there was some difference of opinion between the parties, Mr. Daniels being of opinion that the plaintiff was entitled to manufacture it under the former contract as an improvement. After some discussion and negotiations it was agreed that *White* might resign his employment and himself engage in the manufacture and sale of swages under his last invention, and *White* thereupon resigned and

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devoted his time for a number of months to making patterns and models of the third invention in the plaintiff's shop, and paid the plaintiff considerable sums for the shop work, etc., the plaintiff knowing that *White* intended to himself manufacture and sell the new swage from the models so made, but not knowing that he proposed to sell them under the name "New Improved White Swage," or any name incorporating the word "White" therein. *White,* in April, 1909, engaged in the manufacture of swages under the third invention, and began to distribute in the United States and Canada catalogues describing his swages as the "New Improved White Swages," and used the word "White" as a trade-mark on the machine itself. The catalogue announced that *White* had severed his connection with the plaintiff, and designed an entirely new line of swages to be marketed and sold under his own name and to be known as the "New Improved White;" that they contained radical changes and improvements, and did not contain any important feature or part of the White swages made and sold by the plaintiff. The trial court found that considerable confusion had been caused by the issuance of this catalogue, that orders from customers for swages that were intended for the plaintiff were addressed and sent to *White,* and that the use of the word "White" or the words "New Improved White" by the defendant is likely to deceive the plaintiff's customers in the purchase of saw swages, and also tends to confuse purchasers as to which swage is intended, and is in fact injurious to the plaintiff's trade and business.

From the foregoing facts the court concluded (1) that the plaintiff acquired and had the exclusive right to manufacture and sell in the United States and Canada the saw swages covered by the first and second patents according to the terms of the second contract aforesaid; (2) that the defendant had the lawful right to manufacture and sell the saw swage invented by him in August, 1908, and that the plaintiff was estopped from claiming any right to manufacture or sell the same; and

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(3) that the use by defendant *White,* in advertising or describing the swages made by him, of the words "White Saw Swages," "New Improved White Swages," and the word "White" in describing the same, or as a trade-mark thereon, tends to deceive plaintiff's customers and is in violation of plaintiff's right, and that plaintiff is entitled to an injunction restraining the said *White* therefrom, but not from carrying on the business of manufacturing or selling swages in his own name.

Judgment was entered substantially according to the finding. That part thereof which enjoined the defendant *White* from advertising and selling his swages under the name "White Saw Swage" and other kindred names is as follows:

"It is further ordered, adjudged and decreed, that the defendants and each of them, their agents and servants, in advertising or selling any swage or device designed or intended as a swage of saws be, and they are hereby, perpetually enjoined, restrained and forbidden from using in any manner as a trade-mark or trade-name, or as a name designating any such swage or device, the words "White Saw Swage," "Improved White Saw Swage," or "New Improved White Saw Swage," or the word "White" with or without other words of designation; but the defendants and each of them may use his or her own name in carrying on or conducting the business of such defendant in the manufacture or sale of any swage which such defendant has a right to manufacture or sell, and may use such name or any portion thereof as the name or as a portion of the name of any firm or corporation with which such defendant may be associated in such business, and if such be the fact, may advertise that the defendant, *Albert E. White,* is the inventor of the swage so manufactured or sold, provided that said defendants shall not use as such firm or corporation name the words "White Saw Swage," "Improved White Saw Swage," or "New Improved White Saw Swage," nor any of said combination of words either with the word "Company" added or the word "Saw" omitted, and said defendants shall not by any artifice use any other firm or corporate name in such manner as to be an advertisement of swages under the names herein prohibited."

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The defendants appeal from those parts of the judgment enjoining them from manufacturing swages under the first two patents and from that part of the judgment enjoining them from the use of the word "White" as a trade-mark or in the description of saw swages manufactured and sold by them. The plaintiff appeals from that part of the judgment which determines that the defendant has a right to manufacture and sell saw swages under the invention of 1908. The defendant *Georgianna M. White* originally interposed a separate demurrer to the complaint, on the ground that no cause of action was stated against her, and this demurrer having been overruled on the ground that she was a proper party to the action, she adopted the answer of *Albert E. White* as her own, and the case proceeded at once to trial. She now claims error in overruling her demurrer, in addition to her contentions on the merits of the case.

For the plaintiff there was a brief by *Bundy & Wilcox,* and oral argument by *C. T. Bundy.* Upon the subject of unfair competition they cited 28 Am. & Eng. Ency. of Law (2d ed.) 408–429; *Oppermann v. Waterman,* 94 Wis. 583, 69 N. W. 569; *Listman M. Co. v. W. Listman M. Co.* 88 Wis. 33, 60 N. W. 261; *Fish Bros. W. Co. v. La Belle W. Works,* 82 Wis. 564, 52 N. W. 595; *Howe S. Co. v. Wyckoff, S. & B.* 198 U. S. 118, 25 Sup. Ct. 609; *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169, 11 Sup. Ct. 1002; *Sheffield-King M. Co. v. Sheffield M. & E. Co.* 105 Minn. 315, 117 N. W. 447. They also contended that plaintiff controlled the fundamental invention, hence defendant had no right to manufacture his third machine which utilized improvements covered by the earlier patents, citing *O'Reilly v. Morse,* 15 How. 62; *Thomson-Houston E. Co. v. Ohio B. Co.* 80 Fed. 712.

For the defendants there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *James G. Flanders,* of counsel, and oral argument by *Mr. Flanders* and *Mr. C. E.*

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Munroe. They argued, *inter alia,* that the courts will not enforce specific performance of revocable contracts. *Ulrey v. Keith,* 237 Ill. 284, 86 N. E. 696; *Excelsior W. P. Co. v. Pacific B. Co.* 185 U. S. 282, 22 Sup. Ct. 681; *Victor T. M. Co. v. The Fair,* 123 Fed. 424; Pomeroy, Spec. Perf. sec. 289; *Marble Co. v. Ripley,* 10 Wall. 339, 359; *Rust v. Conrad,* 47 Mich. 449, 455, 11 N. W. 265; *Express Co. v. Railroad Co.* 99 U. S. 191; *Park v. M., St. P. & S. S. M. R. Co.* 114 Wis. 347, 353, 89 N. W. 532; *Peshtigo L. Co. v. Ellis,* 122 Wis. 433, 439, 100 N. W. 834. The contract with *Mrs. White* did not cover the second invention, but superseded the first contract, and without an express contract plaintiff could claim no exclusive right. *Hapgood v. Hewitt,* 119 U. S. 226, 7 Sup. Ct. 193; *Dalzell v. Dueber W. C. Mfg. Co.* 149 U. S. 315, 320, 13 Sup. Ct. 886; *American C. L. Co. v. Wilson,* 198 Mass. 182, 84 N. E. 133; *Johnson F. & E. Co. v. Western F. Co.* 178 Fed. 819; *Agawam Co. v. Jordan,* 7 Wall. 583; *McClurg v. Kingsland,* 1 How. 202; *Pressed Steel C. Co. v. Hansen,* 137 Fed. 403; *Valley I. W. Mfg. Co. v. Goodrick,* 103 Wis. 436, 78 N. W. 1096; *Fuller & J. Mfg. Co. v. Bartlett,* 68 Wis. 73, 31 N. W. 747. Upon the question of estoppel they cited *Gill v. U. S.* 160 U. S. 426, 16 Sup. Ct. 322; *Lane & B. Co. v. Locke,* 150 U. S. 193, 196, 14 Sup. Ct. 78; *Timoney v. Buck,* 84 Fed. 887; *Dickerson v. Colgrove,* 100 U. S. 578, 580; *Swain v. Seamens,* 9 Wall. 254; *McLean v. Dow,* 42 Wis. 610. As to unfair competition they cited Paul, Trade-marks, §§ 209, 210, 215; *Gorham Mfg. Co. v. Emery-Bird-Thayer D. G. Co.* 104 Fed. 243; *Kann v. Diamond S. Co.* 89 Fed. 706; *Morgan E. Co. v. Walton,* 86 Fed. 605; *Burgess v. Burgess,* 3 De G., M. & G. 896; *Rogers & Bro. v. Rogers,* 53 Conn. 121, 155, 1 Atl. 807; *Turtin v. Turtin,* L. R. 42 Ch. Div. 128, 143; *Fish Bros. W. Co. v. La Belle W. Works,* 82 Wis. 546, 52 N. W. 595; *Rowell v. Rowell,* 122 Wis. 1, 99 N. W. 473; *Marshall v. Pinkham,* 52 Wis. 572,

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9 N. W. 615; *Dr. A. Reed C. S. Co. v. Frew,* 162 Fed. 887; *Magee F. Co. v. Le Barron,* 127 Mass. 115; *P. Lorillard Co. v. Peper,* 86 Fed. 956, 960.

WINSLOW, C. J. *Mrs. White* is unquestionably a proper, if not a necessary, party to this action. A substantial part of the relief sought consists in determining the rights of the plaintiff in the manufacture and sale of a certain machine covered by a patent of which she is, at least, the record owner. A complete settlement of the questions involved in the action could hardly be satisfactorily attained unless she be present as a party. Sec. 2603, Stats. (1898).

The facts in the case are very largely undisputed. Upon the disputed propositions we have quite carefully examined the evidence and have found no reason to differ with the conclusions reached by the trial judge, hence the questions to be considered are purely questions of law, and they are four in number, viz.: (1) Was the contract of November, 1896, between the plaintiff and *A. E. White* superseded by the contract of September, 1899, between the plaintiff and *Georgianna M. White?* (2) Was the machine covered by the second patent an improvement upon the machine covered by the first patent within the meaning of the two contracts? (3) Has the plaintiff any rights in *White's* third invention? (4) Should *White* be restrained from using the word "White" as a trademark, or from advertising and selling his third invention under the name "Improved White Swage," or a similar combination of words which include the word "White" as an essential element?

1. The first question must be answered in the affirmative. That the title of the patent was placed in the name of *Mrs. White* without consideration is undisputed. That this was merely a formal transfer and without intention to make any practical difference in the real ownership or power of control

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by *Mr. White* is hardly open to doubt. All the facts indicate this result. *Mrs. White* signed the second contract at request of her husband without knowing its contents. The checks for royalties, though made out in her name, went into the family bank account, against which both drew as they had occasion just as before. The business was done by *White* just as before. On both sides the apparent change in ownership was evidently considered merely a change in name but not in legal effect. We cannot escape the conclusion that the contract of September, 1899, was to all intents and purposes the contract of *Albert E. White* so far as the plaintiff is concerned, and hence that it superseded and took the place of the contract of November, 1896.

2. The second question also must receive an affirmative answer. The machine covered by the second patent seems unquestionably to be merely an improvement on the first machine; and it was so denominated by *White* himself in the specification of the second patent. If there were doubt about this, the evidence shows very persuasively that the parties so treated it for four years, and thus removed all question of doubt as to the matter by their own voluntary acts. *Burton v. Douglass,* 141 Wis. 110, 123 N. W. 631, and cases cited.

3. The trial court held that whatever rights the plaintiff might have rightly claimed in the third invention under the clause of the contract giving it the exclusive right to manufacture and sell the inventions and improvements on the original *White* swage "which are or may be invented or added thereto," it had estopped itself from now claiming any right therein by its conduct in allowing *Mr. White* to proceed and make patterns and models in its own shop at a considerable cash outlay for materials, workmanship, etc., paid by him to the plaintiff, with the full knowledge and understanding of its rights and of the intention of *Mr. White* to use those patterns and models in a shop of his own in manufacturing

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swages under the third invention. Here are all the elements of a complete estoppel, and hence the third question must be answered in the negative.

4. The last question is not so much a question of trademark as of fair or unfair competition in trade. It is certain that the plaintiff had at great expense and by efforts extending over a number of years established a market and a reputation for the "White Saw Swage." It had for years used the names "White Saw Swage," "New White Swage," and "Improved White Swage" in its advertising and its catalogues with the express approval of *Mr. White,* indicated over his own signature in the catalogue issued in 1905. Evidently he was willing and even desirous that the machines manufactured by the plaintiff under the first and second patent should become known to the trade and to the public generally as the "White Swage," the "New White Swage," and the "Improved White Swage."

It is unquestionably true that a man's name is his own property, and he has the right to every honest and fair use of it, just as he has to every honest and fair use of his other property. There may be cases, however, where he may be enjoined from using his own name in certain ways. The principle is very clearly stated in the case of *Russia C. Co. v. LePage,* 147 Mass. 206, 17 N. E. 304, as follows:

"Every one has the absolute right to use his own name honestly in his own business for the purpose of advertising it, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right to it are subjected is *damnum absque injuria.* But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name."

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Singer Mfg. Co. v. June Mfg. Co. 163 U. S. 169, 16 Sup. Ct. 1002; *Herring-Hall-Marvin S. Co. v. Hall's S. Co.* 208 U. S. 554, 28 Sup. Ct. 350.

The name of a person may become so bound up with a particular product that the attaching of the name to a similar and later product would have the effect of a false representation that it was in fact the original product. The idea is thus expressed, with plentiful citation of authorities, in 38 Cyc. 811:

"Where a personal name has become the trade-name for particular goods, another person of the same or a similar name may not use such name as the trade-name for similar goods, or in such a way as to cause his goods to be known and called for in the market by the same name as his rival's goods are already known to, and called for by, the purchasing public."

Such is the case here. The swages manufactured by the plaintiff have become favorably known to the trade and purchasing public by the name of the "White Swage" or the "Improved White Swage." Now, while *Mr. White* may rightfully manufacture and sell his newly invented swage, using his own name, he obviously ought not to be allowed to mislead the public into believing that it is the swage long manufactured by the plaintiff that he is selling.

This we understand to be the true meaning of the judgment on this branch of the case. *Mr. White* may use his own name in his business, either separately or as part of the name of a firm or corporation, and may advertise the fact that he is the inventor of the swage which he is selling. He may also advertise that he makes and sells a saw swage, an improved saw swage, or a new saw swage, for none of these words can be appropriated by any one,—they are public. But he is debarred from advertising or designating his swage by such combinations of words as the "White," or the "White Saw Swage," or the "Improved White Saw Swage," because thereby he is likely to deceive customers, and lead them to suppose that he

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is making and selling the product long known to the trade, with *White's* knowledge and consent, under those or very similar names.

It is suggested that the case of *Fish Bros. W. Co. v. La Belle W. Works,* 82 Wis. 546, 52 N. W. 595, holds a somewhat different doctrine. In that case the defendants were permitted to use their own names and even the rebus of a fish, although the plaintiffs had acquired by purchase of their former business the right to use those names and the rebus as a trade-mark. The question arose upon an application for a preliminary injunction, not after trial, and there were no facts showing that actual injury had resulted to the plaintiffs. This court held that the defendants could lawfully apply to the wagons made by them their names and the rebus, provided they did it in a way not calculated to induce persons to buy the same as and for those manufactured by the plaintiffs. It was further said, "their advertisements and marks must truthfully and in good faith refer to their own manufactures, trade, and business, and not to those of the plaintiffs." Thus the case recognized the principle that the names must not be used in a way to deceive the purchasing public. In that case, as before stated, there was no proof of actual deception or injury; but in the present case there is not only proof, but a finding to that effect, and hence we cannot regard anything actually decided in that case as contrary to the principle decided in the present case.

In one respect the judgment is too sweeping and must be modified. It adjudges that the plaintiff has the exclusive right to manufacture and sell the saw swages covered by both the first and second patents during the "life of said patents," and enjoins the defendants from manufacturing or selling the same during such period.

The contract which governs the rights of the parties, namely, the second contract, grants the exclusive right "to the full end of the term of said patent, subject to the conditions

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hereinafter named." The patent there referred to, and the only one then existing, was the first patent, issued August 3, 1897, and expiring in 1914, hence the exclusive right must terminate at that time, and the judgment must be so modified. It must be further modified by adding to the adjudication of the exclusive right during the life of the first patent a clause providing that such right is subject to termination under the provisions of the fourth subdivision of the second contract.

With these modifications the judgment must be affirmed on both appeals.

By the Court.—It is so ordered. No costs are allowed to either party, except that the fees of the clerk of this court shall be taxed and paid by the defendants.

SIEBECKER, KERWIN, and TIMLIN, JJ., dissent from that part of the decision which affirms the injunction below prohibiting the use by defendant of his name.

BREAKSTONE, Respondent, vs. APPLETON MUTUAL FIRE INSURANCE COMPANY, Appellant.

April 3—April 23, 1912.

Fire insurance: Mutual companies: Amendment of statute: Effect on policies: Assessments: Notice: Publication: Insufficient notice: Default in payment: Forfeiture.

1. A statute regulating assessments by mutual fire insurance companies, in force at the date of a policy, becomes a part thereof even though when the company was organized the statute was different and the then existing statute was embodied in the articles of organization and is indorsed upon the policy; and wherever the law and the language of the policy differ the law is paramount.
2. In sec. 1941—9, Stats. (Laws of 1909, ch. 459), the provision that a mutual fire insurance company, upon completing an assess-

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ment, shall cause to be published a notice stating the time when such assessment was levied and the time when the same becomes due, and that "such notice, together with proof of the publication thereof, shall be conclusive evidence of notice of such assessment," deals with the subject of proof, not with the assessment itself; and the particular method of proof therein referred to was not intended to be exclusive.

3. If an assessment has been duly made and the notice thereof prescribed in said sec. 1941—9 has been duly given to a policy-holder by mail, a default in payment will be followed by suspension of his policy as provided in said section, regardless of the requirement for publication of notice.

4. The notice of assessment given to a policy-holder by mail under said sec. 1941—9 is insufficient unless, in compliance with that section, it states among other things the amount of the assessment; and nonpayment by a policy-holder receiving only such an insufficient notice does not work a suspension or forfeiture.

APPEAL from a judgment of the circuit court for Forest county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to recover on an insurance policy. The cause was tried by the court. The facts found, or otherwise appearing, are as follows: A policy of insurance was, in due form, issued by defendant on plaintiff's property, as alleged in the complaint. Within the life of such policy, unless it sooner lapsed for failure to pay an assessment as hereafter mentioned, the property was destroyed by fire. Defendant is organized under secs. 1941—1 to 1941—13, inclusive, of the Statutes of Wisconsin, and acts amendatory thereof. In due form, as required by sec. 1941—9, as amended (Laws of 1909, ch. 459), an assessment was made as to all policies of the class to which the one in question belonged. The amount as to the particular policy was $4.50. No notice of the assessment was published but within thirty days after the making thereof a notice, dated at Appleton, April 6, 1910, was mailed to, and in due course received by, plaintiff, which specified as follows: Losses amounting to $2,091.16 have accrued since January 1, 1910. The company has not sufficient funds to pay the same. It has become necessary to make an assessment because of such de-

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ficiency. The board of directors have made an assessment of sixty per cent. of the premium charged, with two per cent. additional for collection, on all policy-holders who were members of our company when our last loss occurred. The assessment is due on or before May 6, 1910. Your amount is indicated by a bill below. Make all checks payable to the order of the company. This notice was sent by the secretary of the company in its name. When defendant was organized sec. 1941—9 aforesaid, required every such company, by its secretary, in case of completing an assessment, to "immediately cause to be published for three successive weeks in such weekly newspaper, printed within the city or village, if any, in which the office of such company is located, otherwise in such newspaper printed within the county as the board of directors may designate, a notice stating the time when such assessment was levied and the time when the same becomes due; said notice, together with proof of the publication thereof, shall be conclusive evidence of notice of such assessment; and within five days after the levying of such assessment the secretary shall notify every member by letter or postal card, sent to his usual postoffice address, of the amount of such assessment, and the sum due from him as his share thereof, and the time within which and to whom payment is to be made, which time shall not be less than sixty days nor more than ninety days from the date of such notice as the board of directors may, at the time of making such assessment, have determined;" and provided that, "if the assured neglect to make payment of any assessment within the time specified in the notice sent him, his policy shall be null and void until such assessment is paid, and also his *pro rata* share of all other assessments which may be levied during the suspension of the policy on account of the nonpayment of a previous assessment;" and that "an action at law may be brought against any member of such corporation who shall refuse or neglect to pay any assessment made upon his insured property."

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Such provisions of law were embodied in the articles of organization of defendant. By ch. 459, Laws of 1909, which was in force when the policy in question was issued, the time for mailing notice of an assessment was changed to "within thirty days after the levying" thereof, and the time for payment to "not less than thirty nor more than sixty days from the date of such notice." Defendant attempted to comply with the amended statute. Plaintiff failed to pay her assessment within the time specified in the notice. After expiration thereof the property burned. Thereafter plaintiff handed to a solicitor for defendant a check for such assessment. He had no right to receive the same. In due course, it was returned to plaintiff with notice that the policy was not in force when the fire occurred and, therefore, the defendant could not accept payment of the assessment. The amount due, if anything, on the policy is $1,000.

The questions of law were thus closed: There was no waiver of the default. The notice of assessment did not comply with the statute. Failure to publish notice of the assessment rendered it invalid as to plaintiff. She is entitled to judgment for the amount due on the policy with interest and costs.

For the appellant the cause was submitted on the brief of *John Bottensek.*

Paul J. Winter, for the respondent.

MARSHALL, J. As indicated in the statement, the statute in force at the date of the policy became a part of it, regardless of the condition when appellant was organized and that the then existing statute was embodied in its articles of organization and indorsed upon such policy. In whatsoever respect the law and language of the policy differ, the former is paramount. The feature of the statute, as its terms plainly indicate, as to publishing notice of an assessment and proof thereof being "conclusive evidence of notice of such assessment" deals only with the subject of proof,—not with the assessment itself. It will be noted that duty to publish depends

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upon completion of the assessment, and the words "shall be conclusive evidence" by reasonable, if not necessary inference, suggest that the particular method of proof was not intended to be exclusive. By the terms of the statute, upon an assessment being completed, the duty to call in the proceeds arises, to be performed in due course, independently of the duty to publish.

By unmistakable language, it is provided that,—an assessment having been levied and notice within thirty days thereof given to a policy-holder by letter or postal card, stating the amount of the assessment, the sum due from such policy-holder as his share thereof, and the time within which and to whom payment is to be made, such time to be not less than thirty nor more than sixty days from the date of such notice as the board of directors may, at the time of making the assessment, have determined,—payment must be made within such time or the policy will be in suspension during the period of delinquency. So the forfeiture clause depends for vitality upon the making of the assessment, notice thereof by mail to policy-holders, as indicated, and a default, regardless of the requirement for publication of notice.

Now there being no question but that the assessment was made, that notice thereof was sent to respondent within the time required by law and received, in due course, and that there was a failure to pay in time, such failure suspended the policy, if the notice complied with the statute. If it did not, time for payment of the assessment had not commenced to run against respondent at the time of the fire. As stated in *Milwaukee T. Co. v. Farmers' Mut. F. Ins. Co.* 115 Wis. 371, 91 N. W. 967, it matters not that, though some particular fact required to be stated in the notice was omitted, respondent was not prejudiced thereby. The law made operation of the forfeiture clause dependable upon notice of a particular character. Therefore, if any fact required to be stated was omitted from the notice, there was no default.

It seems that one of the essentials of an efficient notice is a

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statement of the amount of the assessment. Not the amount of losses to be provided for, nor the rate of assessment; but the gross amount levied upon the particular class of policies subject to assessment. We are unable to find anything of that sort in the notice in question. It states the amount of losses to be paid and insufficiency of funds therefor, rendering the making of an assessment necessary; thus clearly indicating that the amount of the assessment was different from the amount of losses waiting for payment. The specified per cent. of assessment "upon the premium charged" merely referred to the rate of assessment. That did not indicate the amount of the assessment nor furnish means for determining it by computation. So there does not seem to be any escape from the conclusion that a very significant feature of an efficient notice to start time running for payment of the assessment was wholly omitted, rendering the notice insufficient as the trial court held.

By the Court.—Judgment affirmed.

COHODES, Respondent, vs. MENOMINEE & MARINETTE LIGHT & TRACTION COMPANY, Appellant.

April 3—April 23, 1912.

Street railways: Injury to passenger: Evidence: Res gestæ: *Witnesses: Competency: Physicians and surgeons: Privilege: Damages: Instructions to jury: New trial: Newly discovered evidence: Appeal: Harmless errors.*

1. Where plaintiff fell and was injured in attempting to alight from a street car, questions addressed to her by the motorman after he had stopped the car and come back to her, as to why she got off while the car was going and why she didn't ring the bell, and her response thereto, were a part of the *res gestæ*, so that evidence thereof was admissible on behalf of the street railway company.

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2. But the motorman and another witness having testified as to such questions and response, exclusion of the testimony of a third witness to the same effect was not prejudicial error.
3. A physician for a street railway company, who was called to attend an injured passenger and who acted as her attending physician, was incompetent under sec. 4075, Stats. (1898), to testify to information acquired while acting in that capacity, as to the nature and extent of her injuries, for the purpose of showing that such injuries were not serious and that plaintiff was endeavoring to perpetrate a fraud upon the company.
4. Although plaintiff herself testified concerning her condition and the nature and extent of her injuries, she did not thereby waive her rights under said statute.
5. The provisions of said sec. 4075, Stats. (1898), are in no way relaxed in such a case by the later legislation requiring physicians to file death certificates in a public office and to make report of certain accident cases to local registers of vital statistics.
6. An instruction upon the question of damages which stated that plaintiff was "entirely disabled" from doing her work as a boarding-house keeper, did not imply that she was so disabled continuously down to the time of the trial; but even if it did, the undisputed evidence in this case would warrant it, and hence no prejudice could have resulted.
7. To entitle a party to a new trial on the ground of newly discovered evidence, it must appear that he used due diligence to secure such evidence, that it is not merely cumulative, and that its production would probably bring about a different result; and upon this last point the trial court is best qualified to judge.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

On the morning of Thursday, July 8, 1909, the plaintiff was a passenger on a street car of the defendant company. She took a car near her home in Marinette and went to Menekaune to purchase fish, and took the same car to return to her home in Marinette. The car was going westerly on Hall avenue, and at South Raymond street, where the plaintiff wished to alight, she was the only passenger left in the car. In attempting to alight from the car she fell onto the street and was

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injured. She was assisted to her home and an injury to her head was then dressed. On the following Wednesday she was taken to a hospital, where she remained two weeks. She was then brought home and in two weeks was again taken to the hospital, to remain for three weeks. While at the hospital the second time she underwent an operation for an injury to the womb and for an injury to the rectum, and was also operated on for appendicitis.

The plaintiff testified that prior to receiving the injuries she was a strong, healthy woman, that she kept boarders and did all the necessary work, with but slight help from her small children, but that since receiving the injuries she was unable to perform such work. Upon the question as to the cause of her falling she testified that she rang the bell to stop the car as it approached South Raymond street, that the car stopped, and that as she was stepping from the rear platform to the step in the act of alighting it started up and she was thrown to the pavement. She testified that she was bewildered, stunned, and dazed by the fall and sustained an injury to her head; that she was led home without being aware of what was occurring; that she recognized one of her daughters; that she saw the blood which came from the wound on her head; that she asked her daughter to undress and put her to bed and call a doctor; that she became entirely unconscious and remained so for ten days, and that the slight improvement which then began, gradually growing, resulted in full mental control and consciousness only after she had been operated upon.

The motorman testified that the bell was not rung for South Raymond street; that he did not stop there; that after he had gone by he happened to glance back, saw no one in the car, and then saw the plaintiff lying on the pavement; that he stopped the car, assisted the plaintiff home, returned to his car, and on his trip back to town called on the physician employed by the defendant, and that he notified the physician of

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the accident. He also testified that he asked the plaintiff, when he approached to assist her, why she did not ring the bell and why she got off the car without stopping it.

It appeared that a physician came to the home of the plaintiff shortly after she was injured and that he dressed the wound on her head, and that Dr. Redelings, the physician employed by the defendant, arrived thereafter, removed the dressing which the other physician had applied and redressed the wound, and that Dr. Redelings attended the plaintiff as physician each day until she was removed to the hospital. The court refused to admit any of his evidence as to facts learned by him regarding the plaintiff's injuries or physical condition while he was attending her as her physician.

The court refused to admit the evidence of the witness Noonan as to questions he heard the motorman ask the plaintiff as the motorman approached to assist the plaintiff home.

This trial, which is the second trial of this case, was had in January, 1911. The jury failed to agree in the first trial. In February, 1911, the court denied a motion for a new trial. One of the grounds upon which the motion was based was newly discovered evidence. This alleged newly discovered evidence was that of a woman who was sitting at her window near the street crossing when the car from which plaintiff was thrown passed South Raymond street. In effect her evidence is that the bell did not ring, that the car did not stop, and that the motorman asked the plaintiff, when he was assisting her to arise from the pavement, why she did not ring the bell and why she got off the car while it was in motion.

This is an appeal from the judgment for the sum of $3,050 as damages, and for costs.

For the appellant the cause was submitted on the brief of *W. B. Quinlan,* attorney, and *F. J. Trudell,* of counsel.

For the respondent there was a brief by *Fairchild & Goldman,* attorneys, and *P. H. Martin* and *H. R. Goldman,* of counsel, and oral argument by *Mr. Martin.*

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SIEBECKER, J. It is urged that the court erred in excluding the evidence of the witness Noonan, to the effect that he heard the motorman ask, when he approached plaintiff after she had fallen into the street, "why she got off the car before the car stopped, or while the car was going, and why she didn't ring the bell; I did not understand what she said; she attempted to say something." This evidence is so closely connected with the transaction that it must be deemed to be the spontaneous utterances of the speakers, springing out of the transaction itself, and hence the product of the speaker's mind, prompted by the event and not the result of deliberation after the event, and therefore it was part of the *res gestæ*. It appears, however, that the witness Annie Whelihan testified to this same conversation, stating that the motorman asked the plaintiff why she did not ring the bell and why she got off the car before it stopped, and that the plaintiff made some reply she did not understand. The motorman, in parts of his examination, testified to the same effect. This evidence was submitted to the jury. Under these circumstances the ruling complained of operated in no way prejudicially to the defendant's rights, since the evidence received embraced the matter stricken out.

Dr. Redelings was the plaintiff's attending physician for about a week. The defendant sought to elicit from him evidence tending to show that there was nothing serious about the alleged injuries, and that the plaintiff was endeavoring to perpetrate a fraud on the defendant and was malingering as to her injuries for the purpose of increasing the damages. The inquiries propounded to the doctor for this purpose necessarily embraced information acquired by him while he was attending her in his professional capacity to enable him to prescribe for her. He testified that he was called to attend her and that whatever information he had as to the nature and extent of her injuries had been acquired by him while attending her as her physician. Such information is within the

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provisions of sec. 4075, Stats. (1898), and cannot be disclosed over the plaintiff's objection. The cases in this court cover the points argued in this case and are decisive as to defendant's contention. *Boyle v. Northwestern Mut. R. Asso.* 95 Wis. 312, 70 N. W. 351; *Green v. Nebagamain,* 113 Wis. 508, 89 N. W. 520, and cases there cited. The contention that because plaintiff testified concerning her condition and the nature and extent of her injuries she thereby waived her rights under this statute is also negatived in the *Green Case,* which was adhered to in *In re Will of Hunt,* 122 Wis. 460, 100 N. W. 874.

It is argued that legislation requiring physicians to file death certificates in a public office and to make report of certain accident cases to local registers of vital statistics is a legislative declaration that the secrecy, as formally enjoined by the provisions of sec. 4075, Stats. (1898), has been relaxed, and that the privilege thereof, in cases like the present one, should be more restricted than formerly. We perceive no basis for this claim. There is no question before us of receiving evidence of facts embraced in any such certificate or report of Dr. Redelings. The court properly restricted the examination of the doctor upon the points involved.

The jury were instructed as follows on the question of damages:

"Then you should consider what she has lost by reason of her inability to work and earn money. It appears that she was a widow lady, keeping boarders, doing her own work entirely, and, according to the testimony, she was entirely disabled for doing that kind of work; and you will consider what would be a reasonable compensation for her loss under that head up to the present time, and for the future, as far as the testimony makes it certain that she will lose by reason of her inability or impaired ability to work and earn money in future."

It is contended that this instruction is a direction to the jury that plaintiff was entitled to damages for total disability

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from doing the entire work of keeping boarders up to the time of trial, and that the evidence as to her disability was in dispute, and hence the instruction invaded the province of the jury and determined the facts of the extent of her disability and the time of its existence. The language of the court is not to be interpreted as contended by the appellant. The meaning naturally conveyed and intended by the court, when applied to the facts before the jury, was that the plaintiff became entirely disabled from doing her work as boarding-house keeper. It was not, however, stated for how long a time such disability continued. It is to be presumed that the jury understood the court's language in the sense in which it was used, and that it informed the jury concerning the plaintiff's claim to compensation in the light of the facts, namely, that she was entitled to compensation for total disability for such a period as the evidence showed that it had existed before the time of trial. The evidence justifies the court's inference of the fact that she was for a time entirely disabled by the injuries complained of and was unable to do her work, hence the instruction was not prejudicial to the defendant. If it be assumed that the instruction admits only of the interpretation for which appellant contends, still the record fails to show any prejudice, for it appears in effect from plaintiff's evidence and that of the witnesses called in her behalf to testify on the subject of her disability that she was so disabled to the time of trial. This evidence stands uncontradicted. In this view of the case no prejudice could have resulted under the appellant's view of the instruction.

The court denied defendant's motion for a new trial on the ground of newly discovered evidence and all of the evidence in the case. In passing on this evidence the court held that there was nothing showing that the defendant used due diligence to secure the newly discovered evidence, that such evidence was merely cumulative, and that if this evidence were produced there was no showing that the result of the trial

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would probably be different. The trial court is unquestionably best qualified to judge of the effect of such evidence in connection with the evidence adduced on the trial. It is well established by the adjudications that all of these grounds must be affirmatively established by a moving party to entitle him to a new trial. An examination of the facts presented by the motion, in connection with the evidence of the case in all these respects, leads us to the conclusion that the trial court's decision is fully sustained as to each ground and that any one of them justifies his denial of a new trial.

It is argued that the evidence does not support the verdict, in that it fails to show that the accident was caused by the negligence of the motorman, and in that plaintiff's version of the transaction is so contradictory and unreliable as to render it of little if any weight, and in that the favorable verdict for the plaintiff is the result of the passion and prejudice of the jury. A recital of the facts tending to support the verdict can serve no useful purpose. A reading of the record discloses that there was ample evidence in the case to sustain the jury's findings, that the accident and the consequent injuries were proximately caused by the negligence of the motorman, and that the plaintiff suffered the injuries to which she testified. There is no basis upon which this court can hold that the verdict and the rulings of the court were against the clear preponderance of the evidence.

By the Court.—The judgment is affirmed.

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MENOMINEE RIVER LUMBER COMPANY, Appellant, vs. SEIDL and another, Respondents.

April 3—April 23, 1912.

Waters: Title to bed of lake: Pourprestures: Accretion and reliction: Riparian owners: Right of access: Ejectment: Judgment.

1. Where the title to the bed of a lake is in the state one cannot, by building up land or erecting a pourpresture therein, acquire such title.
2. If, by dredging, a riparian owner makes an embankment or island above the water in front of his land at a place below low-water mark, where the title to the bed of the lake is in the state, he acquires no title thereto, even though by reason of subsequent accretion or reliction his ownership may be extended over the space between his original shore line and such embankment or island.
3. Where the title to the bed of a lake is in the state, a riparian owner's right of access to deep water is an incorporeal right and cannot be recovered in ejectment.
4. Where in ejectment a riparian owner, alleging that he had title in fee simple and was entitled to possession of the premises in question, sought to recover an embankment which had been raised above the water by dredging in front of his land, but was unable to show title thereto because such title was in the state, a judgment dismissing the complaint on the merits was proper.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This is an action of ejectment brought to recover a parcel of land now claimed by plaintiff by accretion or reliction to fractional section 9, town 30 north, range 24 east. The answer was a general denial, the defense being possession. After the proofs were in each party moved for a directed verdict. The court directed a verdict for defendants. Judgment was rendered accordingly, dismissing the complaint on the merits with costs, from which judgment this appeal was taken.

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The material established facts in this case are well stated by the learned trial court thus:

"Fractional section 9, assumed for the present to have been and be owned by the plaintiff, borders on Green Bay, and lies south of the mouth of the Menominee river. It projects east further than the bay shore line just south of it. Plaintiff's block 50, as shown on the village plat, was on the southeasterly point of said projection. The water for some distance south and east of that point is comparatively shallow, and for many years was largely occupied by a boom company under leases from the plaintiff of such rights as it had, as ground for storing and sorting logs. About three quarters of a mile south of block 50 there was a place estimated at two to three acres in extent, which, at times of low water, was above water, and at times covered, the level of the water varying several feet different years. It was known as Sand Point. Between that point and block 50 there was a space on which the water was more shallow than on either side of it. At the north end of this space and south of the plaintiff's shore line the water was deeper than further south. A steamboat dock was located on the east end of said lot 9, north of said block 50, and boats from the south reached that dock and the mouth of the river by coming up west of said shallow strip between it and the shore and through the deeper water at the north end of said shallow place and plaintiff's shore line. Said boom company in 1887–88 dredged a channel across the northerly end of said low place, throwing up the earth or sand on both sides eight to fifteen feet high, forming banks or dumps about sixty feet wide. This channel is several hundred feet from where the shore line around block 50 was at that time. The water where said channel was dug was at the time it was dug from one to two and more feet deep. After it was dug there was still a channel for boats drawing several feet of water between the north bank or dump and said block 50. The channel and open space east of said lot 9 was filled in with slabs and refuse from sawmills and made solid ground some distance. A large space south and southeast of said block 50, including said shallow space and said rafting channel, was surrounded by said boom company with piers, booms, and breakwaters. These

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obstructions in the water and the storage of logs in said inclosed space interfered with the natural currents and flow of the waters, and caused bark and dirt to accumulate and be held there and cause accretions to the shore to a greater extent than if they had not been there. The open space between the plaintiff's shore line and the land made by dredging said channel became gradually filled up by accretions to the shore on each side, and the shallow ground south of said channel also became more shallow by deposits on it from the water. The levels of the waters in Green Bay, when not affected by winds, have varied different seasons as shown by records kept by the United States since 1860, of Lake Michigan, at Milwaukee, and other points, being at its highest stages from four to five feet higher than when at its lowest stages. These stages vary periodically. During one unusually low stage the space south from said channel was so dry as to permit a ball game upon it. During the past two years the water has been very low; the entire space between said made land and the plaintiff's former shore line as well as quite a distance south from said channel has been above water. Should the water return to its average level during the past fifty years these spaces would again be flooded. The regularity with which high and low stages of water in the lakes and bay have alternated makes it reasonably certain that the waters will again cover the space between the made land and plaintiff's former shore line. The only expert testimony on that question, that of United States engineers, was to the effect that it would.

"The contention of the plaintiff is that by accretions to the shore line of block 50 and reliction of the water therefrom, its title has extended as far out as land has been made. The defendants' contention is that the land occupied by them was never formed by accretions or reliction, but existed for many years as a spot of dry land, not connected with the shore, an island although created by artificial means, not by natural action of the water. There is no question as to the fact. The sand thrown up by the dredge made a bank estimated from eight to fifteen feet high, about sixty feet wide, which, by action of wind and seas, was spread until it formed a tract of land high and dry, embracing all the land in question."

It also appears from the established facts that the original meander line of fractional section 9, as shown by the govern-

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ment survey of 1840, is nearly a quarter of a mile north of the land sought to be recovered in this action. In 1874 an addition was platted on said fractional section. At that time the shore line was a short distance south of the meander line, caused by natural accretion washed to the shore and by artificial filling done by plaintiff.

For the appellant there was a brief by *Wm. B. Quinlan,* attorney, and *Moses Hooper,* of counsel, and oral argument by *Mr. Hooper.*

For the respondents there was a brief by *M. C. Krause,* attorney, and *John E. Tracy,* of counsel, and oral argument by *Mr. Tracy.*

KERWIN, J. The main question involved in this case is whether the land in dispute and in possession of the defendants is owned by the plaintiff. The claim of the plaintiff is that it became such by accretion and reliction, although formerly the land was part of Green Bay, an arm of Lake Michigan, the title to which was in the state. Counsel insists that after plaintiff threw up the embankment the land in question was formed by the combined action of accretion and reliction and such land so formed connected on the shore side with the main land and became a part of it; that the dredging by plaintiff some years before so as to throw up the bank and thereby form an island some distance from the shore is immaterial, because the land made by accretion and reliction lay between the artificial island and the main land and included the artificial island. The learned counsel for plaintiff relies mainly upon the following authorities: *St. Clair Co. v. Lovingston,* 90 U. S. 46, 68, 69; *Lovingston v. St. Clair Co.* 64 Ill. 56; *Freeland v. Pennsylvania R. Co.* 197 Pa. St. 529, 540, 541, 47 Atl. 745; *Knudsen v. Omanson,* 10 Utah, 124, 131, 37 Pac. 250; *Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534, 67 N. W. 918; 1 Farnham, Waters, 324, § 70; *Patterson v. Gelston,* 23 Md. 432, 447; Wiel, Water Rights, 939, § 901;

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Id. 940, § 902, note 21, 942–944, § 904, note 14; *Union D., St. R. & T. Co. v. Brunswick,* 31 Minn. 297, 301, 17 N. W. 626; *Diedrich v. N. W. U. R. Co.* 42 Wis. 248, 262; *Att'y Gen. v. Chambers,* 4 De G. & J. 55; *Lamprey v. State,* 52 Minn. 181, 53 N. W. 1139; *In re Hull & S. R. Co.* 5 M. & W. 327, 332; *People v. Warner,* 116 Mich. 228, 74 N. W. 705; *Holman v. Hodges,* 112 Iowa, 714, 84 N. W. 950; *Roberts v. Brooks,* 78 Fed. 411; *Tatum v. St. Louis,* 125 Mo. 647, 28 S. W. 1002; *Whyte v. St. Louis,* 153 Mo. 80, 54 S. W. 478; 19 Op. Att'y Gen. 149; Gould, Waters, §§ 155, 310, note 7; *Steers v. Brooklyn,* 101 N. Y. 51, 56, 4 N. E. 7; *Memphis v. Waite,* 102 Tenn. 274, 52 S. W. 161; *Adams v. Frothingham,* 3 Mass. 352, 362, 363; *Ledyard v. Ten Eyck,* 36 Barb. 102, 124, 125; *McLennan v. Prentice,* 85 Wis. 427, 444, 445, 55 N. W. 764; *Ill. S. Co. v. Bilot,* 109 Wis. 418, 425, 84 N. W. 855, 85 N. W. 402; *Saunders v. N. Y. C. & H. R. R. Co.* 144 N. Y. 75, 84, 38 N. E. 992; *People ex rel. Blakslee v. Comm'rs,* 135 N. Y. 447, 450, 32 N. E. 139; *Washougal & L. T. Co. v. Dalles, P. & A. Nav. Co.* 27 Wash. 490, 499, 68 Pac. 74; *Hall v. Hobart,* 186 Fed. 426, 430–433.

The plaintiff's contention cannot be sustained, as the authorities hereinafter cited, we think, fully demonstrate. To sanction such a rule would be to hold that a riparian owner could by artificial means acquire title to the bed of a lake far below the shore which belonged to the state. The disputed tract is the dump or bank made by plaintiff in so dredging the channel in the bay as to raise the land several feet above the level of the bay. No title could be acquired by such acts. The title still remained in the state, and, in order to recover, it was incumbent upon plaintiff to prove title in itself. *Ill. S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855, 85 N. W. 402; *Diedrich v. N. W. U. R. Co.* 42 Wis. 248; *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Boorman v. Sunnuchs,* 42 Wis. 233. One cannot by building up land or erecting structures

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in a lake, the title to the bed of which is in the state, thereby extend his possession into the lake and acquire the state's title. *Diedrich v. N. W. U. R. Co., supra; Austin v. Rutland R. Co.* 45 Vt. 215; *Dana v. Jackson S. W. Co.* 31 Cal. 118; *People ex rel. Blakslee v. Comm'rs,* 135 N. Y. 447, 32 N. E. 139. The law relating to wharves and docks in aid of navigation does not apply in this case. 1 Farnham, Waters, §§ 118–120.

Point is made by counsel for appellant that the plaintiff acquired title by accretion and reliction in consequence of the filling up of the channel between the embankment and the shore, and that the level of the natural soil underlying the dredged bank came by accretion and reliction above the level of the surface of the lake, so that if the dredged bank were removed the underlying soil would have been land above water; while it is strenuously contended on the part of respondents that all the filling between the land in suit and the main land was caused by artificial means and in some degree by the acts of plaintiff, that it was not permanent and was not created by slow and imperceptible changes, and does not come within the rule of accretion and reliction, hence plaintiff has no title to it. *State v. Thompson,* 134 Iowa, 725, 111 N. W. 328; *Sapp v. Frazier,* 51 La. Ann. 1718; *Stover v. Jack,* 60 Pa. St. 339; 1 Farnham, Waters, p. 339, § 75*a; Saunders v. N. Y. C. & H. R. R. Co.* 144 N. Y. 75, 38 N. E. 992; *Allegheny City v. Moorehead,* 80 Pa. St. 118. But whether this filling between the shore and the embankment was caused by natural or artificial means, or both, or was permanent or otherwise, or created by slow and imperceptible changes, or whether the plaintiff acquired any additions to its shore land by reason of such filling under the doctrine of accretion and reliction, we need not consider, because upon the established facts we are convinced that plaintiff acquired no title to the embankment in dispute by accretion, reliction, or otherwise. It was land raised in the bay below low-water mark, the title

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to which was in the state and never became the land of the plaintiff. *Diedrich v. N. W. U. R. Co.* 42 Wis. 248.

It is well settled that if the land in question were an island which arose from the water and afterwards became connected with the plaintiff's land by dry land, it would not become a part of the plaintiff's land. *People v. Warner,* 116 Mich. 228, 74 N. W. 705; *East Omaha L. Co. v. Hansen,* 117 Iowa, 96, 90 N. W. 705; *Holman v. Hodges,* 112 Iowa, 714, 84 N. W. 950; *Cooley v. Golden,* 117 Mo. 33, 23 S. W. 100; *Bigelow v. Hoover,* 85 Iowa, 161, 52 N. W. 124. Clearly the present case is no stronger than that of an island arising from the water. One cannot acquire title to the bed of a lake or public waters by the erection of a pourpresture. So upon any theory this embankment constructed by plaintiff and remaining above the level of the bay did not become the land of the plaintiff. *Diedrich v. N. W. U. R. Co., supra; Dana v. Jackson S. W. Co.* 31 Cal. 118; *Austin v. Rutland R. Co.* 45 Vt. 215; *People ex rel. Blakslee v. Comm'rs,* 135 N. Y. 447, 32 N. E. 139; *People v. Warner, supra; Cooley v. Golden, supra; Bigelow v. Hoover, supra.*

It is further argued by counsel for appellant that the plaintiff could recover, even if it did not have title, by virtue of its rights as a riparian owner to access to deep water. In order to recover in this case it was incumbent upon plaintiff to prove title. *Ill. S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855, 85 N. W. 402. Plaintiff did not seek recovery by force of possessory rights, but by force of title to the land sought to be recovered. Its complaint is based upon the right to recover title to the land; and our statute, sec. 3077, Stats. (1898), provides that the plaintiff shall in his complaint set forth the nature and extent of the interest which he claims, "whether in fee, dower, for life or for a term of years. . . ."

It has been held that recovery cannot be had in ejectment for a mere easement, because ejectment will lie only for things corporeal. Washburn, Easements, 3; *Racine v. Crotsenberg,*

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61 Wis. 481, 21 N. W. 520. The right of access by a riparian owner to deep waters, where the title to the bed is in the state, is an incorporeal right and cannot be recovered by a riparian proprietor in ejectment. *Racine v. Crotsenberg, supra; Le Blond v. Peshtigo,* 140 Wis. 604, 123 N. W. 157.

Appellant complains because judgment was entered dismissing the complaint on the merits, and insists that it should have been a dismissal without prejudice. The complaint alleges that plaintiff has an estate in fee simple in the lands in question and is entitled to possession thereof. The plaintiff's alleged title was the basis of its right to recover and it was determined that it had no title. The defendants were therefore entitled to judgment on the merits. The statute relating to judgments in ejectment actions so provides. "The judgment, after trial, shall be in accordance with the verdict or decision of the court." Sec. 3086, Stats. (1898).

We have carefully examined the cases cited by the learned counsel for appellant and cannot see that they control this case. We are convinced that the judgment of the court below is right and should be affirmed.

By the Court.—The judgment is affirmed.

FOREST COUNTY, Respondent, vs. UNITED SURETY COMPANY OF BALTIMORE, imp., Appellant.

April 3—April 23, 1912.

Official bonds: Construction: Breach: Liability of surety: Acts done by virtue of office: County judge: Receiving money on illegal claims against county: Action, by whom brought.

1. An official bond entered into by the surety for a money consideration, conditioned that the officer shall faithfully perform the duties of his office and shall pay over or account for all moneys which may come into his hands by reason of his holding such office, is an indemnity bond partaking of the essential features

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pus proceedings; for labor permits granted; for services in investigating death; for special sessions; for sale of real estate of deceased persons; and for salary of register of probate.

The bond in question was for the sum of $3,000, named the board of supervisors of *Forest County* as obligee, and was conditioned as follows:

"Whereas, the said John H. Dawley is the duly elected county judge of and in the county of *Forest,* Wisconsin: Now, therefore, the condition of this obligation is such that if the said John H. Dawley shall faithfully discharge the duties of the office aforesaid and shall well and truly collect and pay over, or account for, according to law, to the proper authorities, the moneys or property which may come into his hands by reason of his holding such office, then this obligation to be void, otherwise to remain in full force and effect."

The defendant surety company demurred to the complaint on the grounds (1) that the plaintiff has no legal capacity to sue, in this, that plaintiff is not the obligee named in the bond upon which said action is based, and that therefore plaintiff is not authorized to sue thereon; (2) that there is a defect of parties plaintiff, in this, that the board of supervisors of *Forest County,* being the obligee named in the bond upon which this action is based, are necessary and proper parties plaintiff to an action to enforce the terms of said bond, but are not made parties plaintiff herein; (3) that several causes of action have been improperly united; and (4) that the complaint does not state facts sufficient to constitute a cause of action.

From an order overruling the demurrer the defendant *United Surety Company* appealed.

For the appellant there was a brief by *Miller, Mack & Fairchild,* and oral argument by *James B. Blake.*

For the respondent there was a brief signed by *A. C. Umbreit,* special counsel, and *John F. Hooper,* district attorney, and oral argument by *Mr. Umbreit.*

VINJE, J. Appellant contends that the obligation of a surety is *strictissimi juris;* that nothing can be taken against

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him by construction; and that his liability cannot be extended beyond the very terms of the conditions of the bond; and cites *Detroit Sav. Bank v. Ziegler,* 49 Mich. 157, 13 N. W. 496; *Gerber v. Ackley,* 37 Wis. 43; *Taylor v. Parker,* 43 Wis. 78; *People v. Pennock,* 60 N. Y. 421; and *Wilson v. State,* 67 Kan. 44, 72 Pac. 517. All those cases deal with accommodation sureties. In the case at bar we have an indemnity bond entered into for a money consideration. Such indemnity bonds partake of the essential features of insurance contracts and should be construed most strongly against the party preparing and furnishing them. *French v. Fidelity & C. Co.* 135 Wis. 259, 115 N. W. 869; *United Am. F. Ins. Co. v. American B. Co.* 146 Wis. 573, 131 N. W. 994; *American S. Co. v. Pauly,* 170 U. S. 133, 18 Sup. Ct. 552. But, even so construed, the liability of a surety upon an official bond must be held to be limited to acts done by the principal by virtue of his office or by reason of the fact that he held the office; that is, some breach of *official* duty must be shown in order to constitute a breach of the bond. *Gerber v. Ackley,* 37 Wis. 43; *Barnes v. Whitaker,* 45 Wis. 204; *Bishop v. McGillis,* 80 Wis. 575, 50 N. W. 779; *State v. McFetridge,* 84 Wis. 473, 54 N. W. 1, 998; *Dishneau v. Newton,* 91 Wis. 199, 64 N. W. 879. In *Gerber v. Ackley,* 37 Wis. 43, the court says: "Acts done *virtute officii* are where they are within the authority of the officer, but in doing them he exercises that authority improperly, or abuses the confidence which the law reposes in him."

It is strenuously urged by the appellant that there is no liability on the part of the surety because the moneys received by Judge Dawley, for which a recovery is sought, were not received by him *virtute officii.* By a reference to the bond it will be seen that it is conditioned to account for all moneys that shall come into the hands of the principal *by reason of his holding such office.* Whether such a condition is broader than one limited to account for all moneys that shall come into his hands *by virtue of his office* need not now be considered or

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determined, because we are of the opinion that the complaint sufficiently alleges a breach of the bond within the latter condition. Sec. 2454, Stats. (Supp. 1906: Laws of 1903, ch. 45), authorizes a county judge, not vested with civil jurisdiction, to receive from the county treasury $5 per day for services not pertaining to probate business, compensation for which is not otherwise provided. The county court of *Forest County* had no civil jurisdiction, so Judge Dawley was entitled to render bills against the county for extra services within the statute. Such authority was conferred upon him by virtue of his office. The bills rendered as shown by Exhibit B were for such alleged extra services. In presenting bills against the county it became his duty as county judge to render just and true bills; to render bills for services actually performed and for such services only for which he was entitled to compensation. This he did not do. The demurrer admitted that he was not entitled to compensation for the services claimed. In presenting such illegal claims and receiving money on them he breached his official duty. It was within his authority to present claims against the county for services rendered within the provisions of the statute, and they were presented by virtue of his office—certainly by reason of his holding the office. In presenting illegal claims he exercised that authority improperly and abused the confidence which the law reposed in him, as expressed in *Gerber v. Ackley,* 37 Wis. 43. A similar breach of duty was discussed in *Jones v. Lucas Co. Comm'rs,* 57 Ohio St. 189, 48 N. E. 882, where the court says:

"The proposition that the drawing of money from the county treasury, by the county auditor upon his own warrant, on a claim in his own favor, known by him to be illegal, for alleged services rendered the county, is a matter merely of individual action, and not a disregard of official duty, is at least a startling one. It appears to be based upon an attempt to distinguish between the man as an individual and the man as an officer. The distinction cannot hold."

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See, also, *Milwaukee Co. v. Hackett,* 21 Wis. 613; *Kewaunee Co. v. Knipfer,* 37 Wis. 496; and *Quaw v. Paff,* 98 Wis. 586, 74 N. W. 369.

Since the condition of the bond is that the principal "shall faithfully discharge the duties of the office," a breach thereof occurred when such duties were not faithfully discharged. The breach of official duty and the breach of the bond went hand in hand. The complaint therefore states a good cause of action as to all the items therein contained against both defendants. That being so, the objection that several causes of action are improperly united, in that no recovery can be had against the appellant as to some of the items, even if there be a liability as to others, falls.

The only other point argued in appellants' brief meriting notice is that the complaint fails to state a cause of action because it does not appear that the action is prosecuted under sec. 984, Stats. (1898). It is claimed that the chairman of the county board, and not the county, is the proper party plaintiff pursuant to the provisions of that section. Counsel, though they quoted the section, entirely overlooked the provision therein that "every action mentioned in this section shall be prosecuted in the name of the state, county, town or other municipality to which such bond is given." Here it is prosecuted in the name of the county, and properly so. The fact that the statute imposes the duty upon the chairman of the county board to see that the action is prosecuted does not mean that it must be done in his name, when the statute specifically provides otherwise.

By the Court.—Order affirmed.

WINSLOW, C. J., and BARNES, J., dissent.

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WILL OF GRANT: WILLIAMS and another, Appellants, vs. MALM and another, Respondents.

April 3—April 23, 1912.

Wills: Execution: Evidence: Recitals in attestation clause: Presumptions: Testimony of witnesses long after event.

1. Recitals in the attestation clause of a will showing due execution thereof are presumed to be true and can only be overcome by clear and satisfactory evidence.
2. The testimony of witnesses as to the details of the attestation of a will more than twenty years before, contradicting their written statement made when they signed the instrument, is *held* in this case less convincing than the written statement itself.
3. A will should not be lightly set aside where there is no question of mental incapacity or undue influence, and where there is no doubt that the testator intended to make and supposed that he had made a valid will.
4. A joint will of husband and wife was signed by the husband, and the wife's signature appeared in the form of her mark. There were three attesting witnesses. The husband devised his property to the wife, the residue, if any, at her death to go to four legatees, three of whom were her relatives. The wife devised to the husband with the remainder over, if any, to the same legatees. The husband died shortly after the will was made and the wife acted as executrix under it, made no changes therein, and died twenty-two years later. One of the attesting witnesses, the scrivener who drew the will, had died; a second, who was eighty years old at the time of the trial, had no recollection of the transaction and at first denied the attestation and asserted that he had never been in the testators' house, but it is conceded that his signature was genuine; the third admitted having signed as a witness, but denied that either the husband or wife or the other witnesses signed in his presence. It is conceded that the will was drawn at the office of the scrivener and, if properly executed at all, was executed at the testators' home. An expert testified that the body of the will, the name of the wife, and that of the deceased witness appeared to have been written with the same pen and the same ink, at the same time and by the same person; also that the "X" mark in connection with the wife's name was made by the scrivener and apparently in a free and easy manner, not indicating that the

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motion of the fingers was interfered with while it was being made. On the other hand, there was evidence that the scrivener was a man in good standing, competent and experienced, who understood the requirements of the law and his duty to see that the will was properly executed; and the wife's executor testified that almost immediately after the execution of the will he saw both testators and the three witnesses together in the testators' house. *Held*, contrary to findings by the circuit court, that the will was properly executed by the wife.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

A certain instrument in writing bearing date August 6, 1887, was prepared by one Benedict, now deceased, as the last will of Charles Grant and Mary C. Grant, to which was subscribed the name of Charles Grant in his own handwriting, and that of Mary C. Grant by mark, said persons being husband and wife, the instrument purporting to be a joint will. Charles Grant died September 27, 1887, and his will was duly proved and admitted to probate by the county court of Kenosha county on November 1, 1887. Mary C. Grant and *Joseph A. Williams,* appointed thereby as executors, qualified and administered the estate of said deceased, and on January 3, 1889, final judgment was entered by said county court assigning the residue of the estate according to the terms of the will. Mary C. Grant died in May, 1909, and said will was thereafter admitted to probate by said county court. An appeal was taken to the circuit court, where the order of the county court was reversed and the will disallowed. From the judgment of the circuit court this appeal is taken.

Henry J. Hastings, attorney, and *Peter Fisher,* guardian *ad litem,* for the appellants.

Robert Verne Baker, for the respondents.

BARNES, J. The circuit court found that the deceased, Mary C. Grant, did not sign the will in question and did not make the mark standing for her signature, but that the name

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was written and the mark was made by the scrivener, Daniel B. Benedict, who drew the will; that said Benedict did not sign the will as a witness in the presence of the testatrix nor at her express direction; that the will was not attested and subscribed in the presence of the testatrix by two competent witnesses; and that the instrument was not duly executed as the will of Mary C. Grant. If these findings of fact are sustained by the required degree of proof, the conclusions of law drawn therefrom are correct and the judgment should be affirmed.

The will, though not drawn by a lawyer, is drawn in a lawyerlike form and in a manner to indicate that Mr. Benedict, the party who drew it, understood how a valid will should be drawn and executed. The evidence shows that he had considerable experience in drafting wills and that he was a man who stood well in the community, having held some responsible positions.

Charles Grant signed the will himself. The name of Mary C. Grant was written by Mr. Benedict. The signature appears thus: "Mary $\overset{\text{her}}{\underset{\text{mark}}{\times}}$ C. Grant." The attestation clause recites that Charles Grant and Mary C. Grant "severally signed, sealed, published, and declared" the instrument as and for their last will and testament "in presence of us, the subscribers, who at their request and in their presence and in presence of each other have subscribed our names as witnesses thereto." Then follow the signatures of the three witnesses to the will, Daniel B. Benedict, Henry C. Dodge, and Joshua H. White.

Charles Grant devised all of his property to his wife, and provided that if any was left at her death the residue was to go to four designated persons, three of whom were relatives of his wife and one a girl who had been brought up by the Grant family, but had not been legally adopted. In the event of his wife dying first, the entire estate was devised to these four persons. Mrs. Grant devised all of her property to her husband, with the remainder over, if any, to the residuary

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legatees named in the will of her husband. The will was executed August 6, 1887, and shortly thereafter Charles Grant died and his will was admitted to probate on November 1, 1887, and his property was distributed according to the terms of the will. Mary C. Grant died in May, 1909, and the aforesaid instrument was admitted to probate as her will. The circuit court reversed the order of the county court. Mary C. Grant was named as one of the executors in her husband's will and acted as such and presumably knew of the contents of the will for nearly twenty-two years after her husband's death, and made no change therein. So it is fair to assume that she was entirely satisfied with the distribution of the property therein provided for.

The witness Benedict was dead when the will of Mrs. Grant was offered for probate. The witness White was eighty years of age, and it is apparent that he had no recollection of the transaction. He first said that he never signed the will as a witness, and later that he did not know whether what purported to be his signature was his or not. It is conceded that the signature was genuine and that he did sign as a witness at some time and place. He asseverated with a good deal of positiveness that he had never been in Grant's house.

The witness Dodge testified that he was called to Grant's house to witness the will and that he did so, but that neither Grant nor his wife signed the will in his presence, and that Benedict did not sign as a witness while he was there, and that White was not in the house while he remained there. There was evidence tending to show, and it seems to be conceded, that the scrivener drew the will in his office, while it is admitted that it was executed in Grant's house, if it was ever properly executed. One Tyrrell, an expert in handwriting, testified that the body of the will, the name of Mary C. Grant, her mark, and the name of Daniel B. Benedict as witness appeared to have been written with the same pen and the same ink and at the same time and by the same person.

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On the strength of the evidence of the expert, with such corroboration as it received from the witnesses Dodge and White, the court concluded that the will was not properly executed, and the question for this court to decide is whether the trial court was right in so holding. The recitals in the attestation clause show due execution of the will, and there is a strong presumption of the truth of these recitals, which must prevail unless overcome by clear and satisfactory evidence. *Adams v. Rodman,* 102 Wis. 456, 460, 78 N. W. 588, 759; *In re Gillmor's Will,* 117 Wis. 302, 303, 94 N. W. 32; *Will of Arneson,* 128 Wis. 112, 116, 107 N. W. 21; *In re Lewis's Will,* 51 Wis. 101, 113, 7 N. W. 829. The correctness of the trial court's decision must be tested by this rule and not by the one ordinarily applicable to findings of fact. Wills should not be lightly set aside where there is no question of mental incompetency or undue influence, and where, as here, there is no doubt whatever that Mrs. Grant intended to make and supposed that she had made a valid will.

The testimony of witnesses as to the details of a transaction such as witnessing a document that took place twenty years before, is a very uncertain guide, where it directly contradicts their written statement made when they signed the instrument. The testimony of White seems to us to be wholly worthless, not because of any sinister motive on his part, but because of the infirmity of age. We do not think it is any more improbable that he should forget that he was ever in Grant's house than it is that he should forget that he ever saw the will or ever signed it, or that the signature thereto was his own, after it had been shown to him. The witness Dodge related the transaction as it occurred to him after the lapse of twenty-two years. There was nothing tragic or dramatic about the occurrence that was calculated to leave a correct and lasting impression on the mind. The human mind is not so constituted that it can accurately carry details for a long period of years, where they are not of such an unusual character

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as to make an extraordinary impression. The written statement signed by Mr. Dodge close on a quarter of a century before he gave his testimony as to how the will was executed, is much more convincing as to what the fact was than his sworn statement on the trial, when he must have been testifying from impression rather than from knowledge.

The trial court attached great and we think undue weight to the testimony of Mr. Tyrrell. Conceding it to be true, we fail to see how it proves very much. It does not prove that the name of the scrivener and that of Mary C. Grant were affixed to the will at the scrivener's office, unless we assume that he could not do this work in Grant's house in the same manner as in the office. The slant of the writing in the signatures is the same as that in the body of the will. This result would be almost sure to follow if the writer assumed the same position in both places. If the chairs in the two places were of substantially the same height and the tables were likewise, we would hardly expect to find any variation in the writings that may have been made only an hour apart. It is true the ink used is the same, but admittedly the witness Dodge signed at the house, and Mr. Tyrrell makes no claim that the ink which Dodge used is different from that with which the names of Mrs. Grant and Mr. Benedict were written. Mr. Tyrrell's testimony shows, and, we think, correctly, that the "X" mark in connection with Mrs. Grant's name was made by Mr. Benedict. It is the common and usual practice for the scrivener to make the mark, the party merely touching the pen while it is being made. It would not be unusual for the scrivener to bring his pen with him when he went to the Grant home for the purpose of completing the will. The one circumstance testified to by Tyrrell which is entitled to some weight is that the mark is apparently made in a free and easy manner and does not indicate that the motion of the fingers was interfered with while it was being made. But this is inconclusive. If the penholder was touched lightly close to the pen, the touch

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might not interfere with the movement of the pen to any appreciable degree.

On the other hand, we have a number of facts which tend to supplement the recitals in the attestation clause. The scrivener, Mr. Benedict, was accustomed to drawing wills, and no doubt understood the requirements of the law in reference to the execution of a valid will. He stood well in the community. He was guilty of a grave breach of duty if he did not see to it that the will was properly executed. Mrs. Grant had no individual property, so that no one was attempting to take anything from her. The legatees in the will, with one exception, were her own relatives and not those of her husband, and all might well be objects of her bounty. She acted as executrix of this will, which, if the evidence of the contestants is true, was never properly executed by her husband. She allowed the same to remain in the probate court as her will without change for nearly twenty-two years, and in addition thereto her executor, *J. A. Williams,* testified that he came to the Grant home almost immediately after the will was executed, and that Mr. and Mrs. Grant and the three witnesses who signed the will were all together in the house when he came in. It is true that *Mr. Williams* is to some extent an interested witness, but if he desired to falsify he might just as easily have testified to something more substantial by saying that he was present when the will was executed and that the name of Mary C. Grant was written at the house and that she made her mark and declared the instrument to be her will before the attesting witnesses. It is true that *Williams* may have been mistaken as to these details after the lapse of so long a time. There is the same likelihood of his being mistaken that there is that Dodge was mistaken, with this exception: *Williams'* evidence corroborates the attestation clause signed by the witnesses, while Dodge's evidence contradicts it.

It is difficult to find precedents that are of much value. The question is one of fact, and it does not often happen that the

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facts of two cases are so near alike that one furnishes a guide for the decision of the other. The two cases in this court which in similarity of facts approach most closely to the one we are considering are the *Lewis* and *Rodman* will cases hereinbefore referred to. In each of these cases the circuit court held that the will was not legally executed, although the attestation clause if true showed the contrary. In the *Lewis Case* this court reversed the circuit court on evidence which in our judgment tended much more strongly to impeach the will than does the evidence in the present case. In the *Rodman Case* it was held by a divided court that the finding of the circuit judge should not be disturbed. There are some material differences between the evidence in the *Rodman Case* and the case at bar. There both witnesses were positive that they did not sign in presence of the testator. Here only one witness whose testimony is worthy of consideration has so testified, and his evidence is to some extent impeached by that of *Williams*. There are other differences which it is unnecessary to enumerate.

As we read and interpret the evidence, instead of impeaching the attestation clause in a clear and satisfactory manner, it hardly raises a suspicion that the will was not properly executed. To overthrow the will on such unsatisfactory evidence would result in placing every will that had long been executed at the mercy of the uncertain memories of witnesses to remote transactions of which their recollections must be hazy to say the least.

We think the trial court failed to give the recitals in the attestation clause the evidentiary weight to which they were entitled, and that undue effect was given to the evidence of the expert and of the attesting witness Dodge. It follows from what has been said that the judgment is erroneous.

By the Court.—The judgment is reversed, and the cause is remanded with directions to affirm the order of the county court admitting the will to probate.

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CITY OF KENOSHA, Appellant, vs. KENOSHA HOME TELEPHONE COMPANY, Respondent.

April 3—April 23, 1912.

Telephone companies: Franchises: Attempted grant by city: Ordinance requiring free telephones: Contract: Consideration: Amendment: Public utility law.

1. An attempted grant of a franchise by a city to a telephone company is inoperative and void, since the franchise conferred upon such a company, when it is incorporated, by sec. 1778, Stats., gives it full authority to construct its lines upon the public highways of the state and the streets of municipalities, subject only to reasonable regulations under the police power.
2. Even if valid at its inception, a franchise theretofore granted by a city to a telephone company was repealed by the public utility law (Laws of 1907, ch. 499), in so far as it conflicted therewith.
3. A city ordinance purporting to grant a franchise to a telephone company and requiring the company in consideration thereof to furnish a certain number of free telephones for the city, cannot be considered as a contract. The city in such case, in its proprietary right, had no consideration to give for such a contract, for it cannot barter the exercise of its police power for free telephones; and as a state agency the city had no power to enter into a contract not subject to amendment by the public utility law. *Superior v. Douglas Co. T. Co.* 141 Wis. 363, distinguished.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action to enjoin the defendant from charging telephone rentals for certain telephones furnished the city of *Kenosha.* Plaintiff claims the defendant is the successor of the Citizens Telephone & Telegraph Company and, as such, is required to furnish the telephones in question free of charge pursuant to the terms of sec. 8 of an ordinance adopted by the city in March, 1903, and accepted by the Citizens Telephone & Telegraph Company. The material parts of the ordinance are as follows:

"Sec. 1. That Citizens Telephone & Telegraph Company of Kenosha, Wisconsin, its successors and assigns, be and they

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are hereby granted the right of way in, upon and along and across the streets, alleys, bridges, sidewalks, public grounds of the city of *Kenosha,* Wisconsin, and across under the river in said city, for the purpose of constructing therein and thereupon a complete telephone exchange, together with all necessary conduits, poles, wires, cables and other appliances necessary to the construction, maintenance and successful operation of a complete modern telephone exchange in said city, for a period of fifty (50) years only."

"Sec. 8. In consideration of the granting of this ordinance the Citizens Telephone & Telegraph Company, its successors and assigns, agrees to furnish free of cost to and for the use of said city of *Kenosha,* and in accordance with the terms, conditions and regulations at any time made for the use of telephones by their subscribers, telephones as follows: one in city clerk's office, one in office of chief of police, one in mayor's office and one in each engine house now or hereafter erected."

Sec. 10 of the ordinance provided for maximum rates for business and residence telephones and for telephones on party lines. Sec. 11 of the ordinance gave the city the option to purchase the telephone system at any time within the life of the ordinance, and provided for a method of ascertaining the price to be paid. By sec. 7 of the ordinance it was provided that if the Citizens Telephone & Telegraph Company, its successors and assigns, should either sell out or enter into any agreement with any existing telephone, or any other, company, or persons, which would tend to make competition inoperative, then the ordinance should be null and void.

In October, 1905, the defendant company purchased the physical property of the Citizens Telephone & Telegraph Company, but the franchise of the latter was expressly omitted from the bill of sale. It continued to furnish free telephone service as provided for in sec. 8 of the ordinance until November, 1908, when it refused longer to do so on the ground that it had been notified by the Wisconsin Railroad Commission that it was unlawful.

The trial court held that the defendant was not the successor of the Citizens Telephone & Telegraph Company, and

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entered judgment dismissing plaintiff's complaint upon the merits, from which it appealed.

Calvin Stewart, for the appellant.

For the respondent there was a brief by *Cavanagh & Barnes* and *Miller, Mack & Fairchild,* attorneys, and *L. G. Richardson,* of counsel, and oral argument by *E. S. Mack* and *Chester D. Barnes.*

VINJE, J. The first question presented by the appeal is, Was the ordinance of March, 1903, purporting to grant to the Citizens Telephone & Telegraph Company the right to operate a general telephone system in the city of *Kenosha,* valid as a franchise? This court has repeatedly answered the question in the negative. The only franchise needed by a telephone company to enable it to conduct its business anywhere within the state is the franchise conferred upon it by virtue of sec. 1778, Stats., when it is incorporated pursuant thereto. *Wis. T. Co. v. Oshkosh,* 62 Wis. 32, 21 N. W. 828; *Marshfield v. Wis. T. Co.* 102 Wis. 604, 78 N. W. 735; *State ex rel. Wis. T. Co. v. Sheboygan,* 111 Wis. 23, 86 N. W. 657; *State ex rel. Wis. T. Co. v. Sheboygan,* 114 Wis. 505, 90 N. W. 441; *Wis. T. Co. v. Milwaukee,* 126 Wis. 1, 104 N. W. 1009; *State ex rel. Smythe v. Milwaukee Ind. T. Co.* 133 Wis. 588, 114 N. W. 108, 315. Such franchise confers upon the incorporated telephone company full and adequate authority to construct its lines upon the public highways of the state and the streets of municipalities, subject only to reasonable regulations under the police power. *Wis. T. Co. v. Milwaukee, supra; State ex rel. Smythe v. Milwaukee Ind. T. Co., supra.* The attempted exercise, therefore, by the city of the legislative function of granting a franchise was ineffectual and void. *Marshfield v. Wis. T. Co., supra; State ex rel. Wis. T. Co. v. Sheboygan, supra; State ex rel. Vilter Mfg. Co. v. M., B. & L. G. R. Co.* 116 Wis. 142, 92 N. W. 546; *State ex rel. Smythe v. Milwaukee Ind. T. Co., supra.*

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But it would avail the city nothing if the franchise was valid at its inception, for the provision contained in sec. 8 thereof for free telephones was repealed by the enactment of ch. 499, Laws of 1907, known as the public utility law. Sec. 1797*m*—89 thereof provides:

"If any public utility or any agent or officer thereof, or any officer of any municipality constituting a public utility as defined in this act shall, directly or indirectly, by any device whatsoever or otherwise, charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it in or affecting or relating to the production, transmission, delivery or furnishing of heat, light, water or power or the conveyance of telephone messages or for any service in connection therewith than that prescribed in the published schedules or tariffs then in force or established as provided herein, or than it charges, demands, collects or receives from any other person, firm or corporation for a like and contemporaneous service, such public utility shall be guilty of unjust discrimination which is hereby prohibited and declared to be unlawful, and upon conviction thereof shall forfeit and pay into the state treasury not less than one hundred dollars nor more than one thousand dollars for each offense; and such agent or officer so offending shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars for each offense."

The effect of this law was to amend the franchises of all existing public utilities operating within the state so as to conform to its provisions. *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530; *Calumet S. Co. v. Chilton,* 148 Wis. 334, 135 N. W. 131; *Kilbourn City v. Southern Wis. P. Co., ante,* p. 168, 135 N. W. 499. Hence, were the ordinance in question valid, sec. 8 thereof would be repealed.

It is clear the ordinance in question purports to grant a franchise and cannot be construed to be a contract between the

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telephone company and the city. In its proprietary right the city had no consideration to give for such a contract, should it be deemed to be one, for it could not barter the exercise of its police power for free telephones. *State ex rel. Wis. T. Co. v. Sheboygan,* 111 Wis. 23, 86 N. W. 657; *Wis. T. Co. v. Milwaukee,* 126 Wis. 1, 104 N. W. 1009; *State ex rel. Smythe v. Milwaukee Ind. T. Co.* 133 Wis. 588, 114 N. W. 108, 315; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530. As a state agency it had no power to enter into a contract not subject to amendment by the public utility law. *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925; *La Crosse v. La Crosse G. & E. Co., supra.*

Much reliance is placed by the plaintiff upon the case of *Superior v. Douglas Co. T. Co.* 141 Wis. 363, 122 N. W. 1023. That was a case where the city of Superior in its proprietary character entered into a contract for free telephones with an existing telephone company operating under a charter from the state. No attempt was made by the city to confer any franchise, or right to operate any telephone system, upon the telephone company. The city and the telephone company, prior to the passage of ch. 499, Laws of 1907, entered into a contract—not a part of any franchise granted or attempted to be granted—whereby the telephone company, for a valuable consideration, agreed to maintain a certain number of free telephones in the city of Superior. The city had paid the consideration by permitting alterations to be made in its city hall and buildings as requested by the telephone company, and it was held the passage of the public utility law did not affect the contract, since sec. 1797*m*—91 thereof expressly provided that "the furnishing by any public utility, of any product or service at the rates and upon the terms and conditions provided for in any existing contract executed prior to April 1, 1907, shall not constitute a discrimination within the meaning specified." It is obvious the case at bar does not come

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within the principle applied or the section referred to in the *Superior Case.*

The trial court held that the defendant was not the successor of the Citizens Telephone & Telegraph Company, and therefore was not bound by the terms of the franchise even if they were valid. We express no opinion on this branch of the case.

By the Court.—Judgment affirmed.

LACONTE, Administrator, Respondent, vs. CITY OF KENOSHA, Appellant.

April 3—April 23, 1912.

Municipal corporations: Death caused by insufficiency of sidewalk: Condition precedent to action: Notice of injury: For whose benefit action may be maintained: Nonresident aliens: Widow of resident: Domicile: Evidence: Admissions: Appeal: Harmless error.

1. Service of notice of injury as provided in sec. 1339, Stats., is not a condition precedent to the maintenance of an action to recover damages for death of a person caused by insufficiency of a public highway.
2. Where a person whose death was caused in this state by a wrongful act, neglect, or default was a resident of the state, had taken out his first citizenship papers, but left a widow in a foreign country who, at the time of his death, purposed joining him here, such widow should not be deemed a nonresident alien, but is entitled to the rights secured to surviving relatives by secs. 4255, 4256, Stats., even though the death occurred prior to the amendment of said sec. 4256 by ch. 226, Laws of 1911.
3. In an action against a city to recover damages for death of a person, alleged to have been caused by insufficiency of a sidewalk, an error in permitting a witness to testify to an admission by the mayor, after the accident, that he knew the sidewalk was dangerous, was so far cured by an explicit instruction to the jury to disregard such evidence as not to be ground for reversal of a judgment against the city.

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APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Affirmed.*

Action to recover for the benefit of the widow of plaintiff's intestate, alleged to have come to his death by insufficiency of a sidewalk in the defendant city.

The pleadings presented the case as indicated in the following, which the evidence established, or tended to show: On a dark night about 10 p. m. the intestate fell from one of defendant's sidewalks and death ensued by reason thereof. His home had been in *Kenosha* for a considerable time. He had taken out his first papers, entitling him to the rights of a citizen of Wisconsin, as the law then stood, though he was not a citizen of the United States. He had a wife, who was at his former home in Italy, and purposed having her join him at his new home. She was of the same mind and had taken some steps to effect the mutual purpose before the event in question. The walk was in front of an excavation which was some eight feet deep and between two buildings. Such excavation was made for the basement of a building to be erected. There was some sort of a barrier at the inner edge of the sidewalk which edge coincided with the brink of the excavation. The barrier was made of two pieces of lumber, one extending from a point some four or six feet from the surface of the walk at the corner of the building on one side down to the edge of the walk near the opposite building, and the other extending from the corresponding corner of such opposite building down to the walk in a similar manner, the two crossing nearly midway between such corners and being there nailed firmly together. There was a cement walk on the outside of the sidewalk area and up to within about three feet of the excavation, the surface of such three feet being about three inches lower down than that of the cement walk and composed of cinders, ashes, and stones. The condition had been as indicated for some six or seven months. It was in one of the most frequented portions of the city. The deceased was well acquainted with the

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situation. While lawfully using the walk near the point where the barrier was fastened pretty high up on the building, by mistake or in some way, he fell into the excavation with fatal consequences. A few moments before such event he came from a near-by saloon where he had been drinking to some extent. He was not apparently intoxicated. He was unconscious when found and did not change in that regard so as to be able to disclose how he came to fall from the walk. No one saw him fall, but he was seen near the place thereof about the time of the occurrence. The surface of the walk along near the brink of the excavation was quite black with cinders and at the particular point it was quite difficult for one to see his surroundings. No notice of the accident, under sec. 1339 of the Statutes, was given. The cause was submitted to the jury, resulting in findings to this effect: The sidewalk, for want of a sufficient guard at the brink of the excavation, was not reasonably safe for public travel. The unsafe condition of the sidewalk was the proximate cause of the accident. Defendant had notice of such unsafe condition a sufficient length of time before the accident to enable it by the exercise of reasonable diligence to remedy the danger. The deceased was not guilty of any contributory negligence. It will require $3,000 to measure the recoverable damages.

In due course judgment was rendered in plaintiff's favor on the verdict.

Calvin Stewart, for the appellant.

Robert Verne Baker, for the respondent.

MARSHALL, J. The first question is this: In case of a person being injured by insufficiency of a public way within the scope of sec. 1339 of the Statutes, and death ensues, the circumstances being such that, had he survived, he would be entitled to maintain an action for compensation in respect to the injury, making a case within sec. 4255 of the Statutes, is an action maintainable for surviving relatives, regardless of the

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condition of said sec. 1339 in respect to serving notice of the injury? That is ruled in the affirmative by *McKeigue v. Janesville,* 68 Wis. 50, 31 N. W. 298. It has been so long settled as not to be open to discussion. The right created by sec. 1339 is one thing; that created by secs. 4255 and 4256 is another. The notice is confined to the former. In case of the latter the vital condition is, death of a person caused by the fault of another such as would, if such person had survived, have entitled him to pursue such other for the recovery of damages.

In case of a death from breach of duty under sec. 1339 the reasonable construction of the words of sec. 4255, "entitle the party injured to maintain an action," etc., with reference to sec. 1339, is, entitle such person to maintain the action and do all the things essential to that end, including performance of the condition precedent to such maintenance; that is, give the requisite notice of the injury. The condition has no reference to the right secured to surviving relatives. If it were otherwise, in any case of death from breach of duty under sec. 1339 without opportunity to satisfy such condition as to the deceased, secs. 4255 and 4256 would have no efficiency whatever. No such absurd result could have been contemplated by the legislature, as suggested in the case cited.

We are not unmindful of the fact that, in *Carpenter v. Rolling,* 107 Wis. 559, 83 N. W. 953, where there was a death, as in this case, a notice was served under sec. 1339 and the court passed upon its sufficiency without suggesting that no notice was necessary. That question was not suggested, or, apparently, thought of. Counsel and the court treated the case as if notice were necessary and dealt only with sufficiency of the one given. There, certainly, was no intention to overrule *McKeigue v. Janesville, supra.* It was rightly decided. We should reach the same conclusion now if we were dealing with the matter from an original standpoint.

The next question is this: In case of the death of a person

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in this state from the fault of another, under such circumstances that had he survived he would be entitled to maintain an action against such other in respect to his injury, such person being a resident of this state and entitled to the rights of state citizenship because of having taken out his first citizenship papers, but leaving a widow in a foreign country who purposed joining her husband at his Wisconsin home,—is such widow entitled to the rights secured to surviving relatives by secs. 4255 and 4256 of the Statutes? That turns on the legislative intent embodied therein. The language is general. In its literal sense it applies to residents of this state and nonresidents as well. In *McMillan v. Spider Lake S. M. & L. Co.* 115 Wis. 332, 91 N. W. 979, where the person for whose benefit the action was prosecuted was the mother of the deceased and a resident of Canada, it was held that the statutes were not intended to confer rights upon nonresident aliens, but were confined to residents. The decision was rendered in general terms. We are not disposed to cast any doubt upon its soundness as regards the particular situation with which the court dealt. It was supported by ample authority and will not be disturbed. The legislature, since the cause of action in hand accrued, has amended the statute so as to render it as broad as its literal sense,—abolishing the distinction between residents and nonresidents whether alien or not. Ch. 226, Laws of 1911.

The court in *Robertson v. C., St. P., M. & O. R. Co.* 122 Wis. 66, 99 N. W. 433, indicated, quite plainly, a disposition to confine *McMillan v. Spider Lake S. M. & L. Co., supra,* to the facts thereof. It declined to treat residents of a sister state as nonresident aliens within the broad language used in the former case, and held that the legislative purpose was not to discriminate between residents and nonresidents to the extent of excluding the latter from the benefit of the statute where they are not residents of a country foreign to the United States.

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It is the opinion of the court that the spirit of restriction manifested, as indicated, should be applied to this case in order to effect the legislative intent. It is not thought such intent was to exclude the wife of a resident of this state who is a citizen thereof, though not of the United States, her purpose, at the time of the death of her husband, being to join him here. In such circumstances the domicile of the wife and citizenship, as regards the statute in question, should be deemed to be that of the husband according to the law in general on the subject.

This court held, as the law stood before ch. 226, Laws of 1911, that, under sec. 12, Stats. (1898), one who has declared his intention to become a citizen of the United States and who has resided in this state one year or more, as in this case, is not a nonresident alien as regards state policy, but is a citizen of Wisconsin with substantially the rights and responsibilities of other citizens. *In re Wehlitz,* 16 Wis. 443; *In re Conway,* 17 Wis. 526. That is not in conflict with the rule that a state cannot make a person one of its citizens who is not a citizen of the United States. *Lanz v. Randall,* 4 Dill. 425; *Minneapolis v. Reum,* 12 U. S. App. 446. That has reference to the conception of the term "alien" as embodied in the federal constitution or acts of Congress of the United States. The policy in this country is to afford the wife of a citizen here the status of her husband in substantially all cases. *Halsey v. Beer,* 52 Hun, 366; *Kane v. McCarthy,* 63 N. C. 299; referring to an act of Congress on the subject. All this reinforces the idea expressed that the construction of the statute in *McMillan v. Spider Lake S. M. & L. Co.* 115 Wis. 332, 91 N. W. 979, should not be extended to exclude from its benefits a person circumstanced as was the widow of the intestate in this case.

Complaint is made because the court permitted a witness to testify to an admission made by the mayor of defendant, after the accident, that he knew the sidewalk was dangerous. The evidence was improper; but, the court, appreciating that,

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distinctly instructed the jury to disregard the evidence. It may be, prejudice thus once created cannot be wholly cured by instructing the jury as in this case; but, in other than very exceptional cases, the rule is that such an error may be thus cured, and it is considered, that the difficulty was so far remedied here that appellant was not, within reasonable probabilities, in any way harmed. The jury were put in possession of the whole situation. They viewed the premises at the time of the trial and were fully informed as regards how the situation as it then existed differed from that at the time of the accident. They heard the witnesses, enabling them to understand the matter fully as regards the safety of the walk, and probably reached the conclusion complained of uninfluenced by the objectionable evidence.

There are some other complaints; but none which seems to call for discussion. It is considered that if they involve error at all, it is error without prejudice.

By the Court.—Judgment affirmed.

CITY OF MILWAUKEE, Respondent, vs. BEATTY, Appellant.

April 4—April 23, 1912.

Municipal ordinances: Letting room for prostitution: Who is "landlord:" Forfeiture: Civil action: Appeal from district court: Person "convicted."

1. **In a municipal ordinance prohibiting any person from leasing or letting, "as landlord," any house, room, or other premises in the city to be used for the purpose of prostitution, the word "landlord" includes a person who lets a room for said purpose in a building occupied by him, although he himself occupies such building only as a tenant under an oral lease from month to month.**
2. **Where a municipal ordinance provides that any person violating it shall upon conviction "be fined," but does not make the pro-**

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hibited acts punishable "by fine and imprisonment," or "by fine or imprisonment," nor specially declare them to be misdemeanors, a civil action may be maintained by the city under sec. 3294, Stats. (1898), to recover the money penalty provided.

3. Within the meaning of ch. 218, Laws of 1899, as amended by ch. 72, Laws of 1907,—providing that every person "convicted" before the district court of Milwaukee county "may appeal from the sentence or judgment against him to the municipal court,"—the word "convicted" applies to a person against whom a judgment has been recovered in a civil action for the money penalty for violation of a city ordinance.

APPEAL from a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

The appellant was convicted in the district court of Milwaukee county of having leased and let, as landlord, through his agent, a certain room, in the building occupied by him in the city of *Milwaukee,* to be used for the purpose of prostitution and lewdness, contrary to an ordinance of the city. The trial on appeal to the municipal court of Milwaukee county resulted in a conviction.

There was evidence before the court that the appellant stated that he, as occupant of the premises in question, had rented out rooms for the night and by the hour. There was evidence also that the appellant was occupying the premises at the time he is accused of having committed the offense, and that he had been in possession of them for two years previous thereto. It was admitted that the appellant had a verbal lease from month to month of the premises.

The evidence of the specific violation of the ordinance upon which the conviction rested was that a man, accompanied by a woman not his wife, had gone to the premises in the nighttime, had rented a room from the wife of the appellant, and had occupied the room and the bed therein with the woman who came with him. Knowledge of the purpose for which the room was rented was supported by the evidence that the man asked the woman who accompanied him, in the presence of

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the wife of the appellant, what her charges were for occupying the room with him, that she gave the amount thereof, and that the man replied, "All right." There was evidence also that the appellant had stated that his wife rented the rooms that were rented at night and that he was the proprietor of the place.

There was evidence tending to show that men and women would meet near this house, go into it, and occupy a room for the purpose of prostitution.

The court found appellant guilty of the offense charged and imposed a fine of $50. Judgment was awarded in the city's favor for this amount and for the costs of the action. This is an appeal from the judgment.

H. L. Eaton, for the appellant.

For the respondent there was a brief by *Daniel W. Hoan,* city attorney, and *E. L. McIntyre,* assistant city attorney, and oral argument by *Mr. McIntyre.*

SIEBECKER, J. The offense charged is that the defendant violated sec. 36 of ch. XX of the general ordinances of the city of Milwaukee, which provides:

"All persons are hereby prohibited from leasing or letting, either as landlord or agent of the landlord, or agent of the tenant, or as landlord through any agent or subagent, any house, room or other premises in the city of *Milwaukee,* to be used for the purpose of prostitution or lewdness. Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not less than fifty nor more than five hundred dollars."

The evidence is clear that the defendant, through his wife as his agent, did, at the time charged, lease and let a room in the house he occupied as tenant for the prohibited purpose. It is argued that the offense charged, that he so leased the room as landlord, is not established, because the evidence fails to show that he was a landlord within the meaning of the or-

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dinance. This claim is based on the facts that he was not the owner of the house and premises occupied by him, and that he occupied them as a tenant from month to month under a verbal lease. The word "landlord," as used in the ordinance, is not restricted in its meaning to an owner of an estate in lands and the improvements thereon greater than a leasehold estate. It clearly embraces tenants of houses and the premises on which they are situated who conduct the inhibited business in such buildings. The evidence shows that the defendant was the keeper and proprietor of this establishment in this house and hence that he stood in the relation of landlord to those to whom he let rooms. The purpose of the ordinance, as expressed by its context, evinces the intent that all persons engaged in letting rooms as proprietors of such a business conducted on leased premises and houses should be treated as landlords within the terms of the ordinance. The court properly held that the defendant's acts under the circumstances shown came within those forbidden by the ordinance.

This action is brought in the name of the city to recover the fine provided for in the ordinance. The acts prohibited by the ordinance are not made punishable "by fine and imprisonment" or "by fine or imprisonment;" nor do the provisions of the ordinance declare such acts to be misdemeanors. Hence they are included within the provisions of sec. 3294, Stats. (1898), under which a civil action may be maintained for the recovery of a money penalty. The following cases are adjudications on the subject and declare the grounds upon which the city has the right to proceed by a civil action in such a case: *Oshkosh v. Schwartz,* 55 Wis. 483, 13 N. W. 552; *Ogden v. Madison,* 111 Wis. 413, 87 N. W. 568; *Koch v. State,* 126 Wis. 470, 477, 106 N. W. 531; *C. Beck Co. v. Milwaukee,* 139 Wis. 340, 120 N. W. 293.

Upon appeal of this case by the defendant from the judgment rendered against him in the district court of Milwaukee

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county to the municipal court of the county, the city moved for a dismissal of the appeal upon the ground that the law made no provision for an appeal in a civil action from such district court to the municipal court. Ch. 218, Laws of 1899, as amended by ch. 72, Laws of 1907, provides:

"Every person convicted before said district court may appeal from the sentence or judgment against him to the municipal court of said city and county of Milwaukee, within ten days from the date of sentence or judgment against him. Said municipal court is empowered to hear, try and determine such appeals and all provisions of law relating to appeals in criminal cases from justices' courts, and the trial and determination thereof shall apply to appeals from said district court to the municipal court."

It is to be observed that "every person convicted before said district court may appeal from the sentence or judgment against him to the municipal court . . ." A successful prosecution of a person for the violation of a city ordinance constitutes a conviction of him, whether it be in the form of a criminal action, wherein punishment is imposed, or a civil action, wherein the prescribed money penalty for guilt is recovered. In prosecutions for violations of ordinances to recover such penalties, the courts have applied the term "convicted" to persons found guilty in such civil actions. See *Ogden v. Madison,* 111 Wis. 413, 87 N. W. 568, and cases there cited. So this statute, in providing for appeals from judgments of the district to the municipal court, uses the words "Every person convicted . . . may appeal from the sentence or judgment" as including a person against whom a judgment has been recovered of a penalty for the violation of a city ordinance. The exposition of the question in the opinion of a minority of the justices of this court in the case of *State ex rel. Cooper v. Brazee,* 139 Wis. 538, 121 N. W. 247, and the statutes and authorities therein cited in support thereof, is a full statement

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of the grounds showing that the municipal court acquired jurisdiction of the action on appeal from the district court, and we herewith adopt the same as a correct statement of the law on the subject and as supporting the judgment of the trial court in this action.

By the Court.—Judgment affirmed.

JAEGER and others, Respondents, vs. GRAND LODGE OF WISCONSIN OF THE ORDER OF HERMANN'S SONS, Appellant.

April 4—April 23, 1912.

Insurance: Mutual benefit societies: Reduction in benefits: Consent: Increase in dues: Retroactive by-law: Conflict between policy and laws: Discrimination between old and new members.

1. Where a member of a mutual benefit society consented to a ten per cent. reduction in the amount of his benefit certificate, to be paid into a guarantee fund in accordance with a by-law adopted by the society, his beneficiaries cannot after his death complain of such reduction as unreasonable and void.
2. Where there is a conflict between a policy of insurance or benefit certificate and the laws of the order issuing the same the former controls.
3. An agreement by the insured, contained in his benefit certificate, that he will comply with the laws of the society then existing or which may thereafter be enacted, does not authorize the society to pass a retroactive by-law increasing for the entire period of his membership the amount of the monthly dues, which he has already paid according to the contract, and giving him the option to pay the aggregate amount of such increase in cash or suffer a reduction of the benefit by that amount. Such a by-law violates the contract of insurance and is unreasonable and void.

[4. Whether a by-law discriminating between old and new members as to rates to be paid in the future is valid, not determined.]

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

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This action was brought against the defendant to recover upon a benefit certificate or policy for $1,000 issued September 1, 1888. The plaintiffs recovered judgment for $363.93 damages and costs, said damages being the amount which the court below held balance due plaintiffs upon the certificate or policy. Upon the trial the defendant admitted there was due and paid over $536.07, and the judgment recovered was the difference between this amount and the face of the certificate less $100. The case was tried by the court without a jury, and the court found that the defendant made the certificate or policy September 1, 1888, to the deceased, Claus Jaeger; that said Jaeger paid all assessments levied and imposed upon him by the *Grand Lodge* for the maintenance of his certificate or policy, and did also pay all lodge dues imposed upon him and required to be paid, and at the time of his death was in all respects a member of said order in good standing; that at a regular meeting of said *Grand Lodge* in 1897 a by-law was enacted requiring every member then belonging to said order or who should subsequently join to submit to a deduction of ten per cent., or $100 of the $1,000 stipulated in his policy to be paid his beneficiary or beneficiaries upon his death, said $100 to be paid into a guarantee fund, and the remaining $900 only should be paid to the beneficiary or beneficiaries designated in said policy; that the wife of said Claus Jaeger, who was designated as beneficiary in his said policy, died at the city of Milwaukee on or about the 1st day of January, 1906; that in pursuance of a stipulation contained in said policy, said Claus Jaeger on the 27th day of February, 1906, changed the beneficiary originally named and designated his six children as beneficiaries, namely, Adolph, Carl, Henry, *Helen, Paul,* and Fred, and requested that the amount of insurance due on such policy, less ten per cent., be paid to said newly designated beneficiaries, and that such ten per cent. thereof, pursuant to the above mentioned by-law, be paid into the guarantee fund; and that a memorandum of such declara-

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tion changing such beneficiaries and providing for a deduction of ten per cent. of the amount designated in the policy to be paid into the guarantee fund was indorsed on said policy and subscribed by the grand secretary of said *Grand Lodge;* that from and after said incorporation of said *Grand Lodge of Wisconsin of the Order of Hermann's Sons,* said defendant corporation duly assumed all the obligations of said *Grand Lodge* which it had entered into prior to its said incorporation, and thenceforth and up to the time of the death of said Claus Jaeger received and collected all the assessments payable by said Jaeger upon said policy and all other assessments levied upon all members of said order; that about the year 1897 said *Grand Lodge* enacted a certain by-law to meet the losses due to the increasing death rate of members, also to the effect that all members who should be such on and prior to the 1st day of March, 1898, should from and after that day be required to pay for the maintenance of their respective policies of $1,000 each certain monthly assessments, varying according to ages attained by such members at the time of becoming members, increasing from ages between eighteen and twenty-five years up to ages between forty and forty-five years, and that members who at the time they became members had attained an age between forty and forty-five years should pay a monthly assessment of $2.75; and that by said by-law it was further provided that all members who should become members after said 1st day of March, 1898, should be required to pay on policies of $1,000 lower monthly assessments, which also varied and increased between the ages of eighteen and twenty-five years up to between forty and forty-five years, and that all persons who at the time of becoming members had attained an age between forty and forty-five years should pay a monthly assessment of $2.04; that said Claus Jaeger became a member of Robert Blum Lodge No. 4 in 1879, and was then forty-four years of age, and from and after March 1, 1898, paid for the maintenance of his policy a monthly as-

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sessment of $2.75 up to the time of his death, all of which assessments were duly paid to said *Grand Lodge;* that said Jaeger died on the 3d day of January, 1910, and at the time of his death was a member in good standing of said Robert Blum Lodge No. 4; that on the 11th day of January, 1910, due notice of the death of said Claus Jaeger was given in writing to said *Grand Lodge,* and more than ninety days expired before the commencement of this action; that on the 26th day of March, 1910, Adolph Jaeger, Carl Jaeger, Henry Jaeger, and Fred Jaeger, four of the beneficiaries designated in the policy, did, for value received, duly assign and transfer to plaintiff *Gustav Jaeger* all their right, title, and interest in said policy and in and to said sum of $1,000 mentioned therein, and ever since said *Gustav Jaeger* has been and still is the owner of an undivided four-sixths of said policy and the money thereby secured; that the plaintiffs *Paul Jaeger* and *Helen Jaeger,* two of the beneficiaries designated, are minors, and are still the owners of an undivided one-sixth each of said policy; that upon proceedings duly had in the county court of Milwaukee county said *Gustav Jaeger* was on the 9th day of April, 1910, duly appointed general guardian of the above named minors, and letters of guardianship were duly issued, and said *Gustav Jaeger* ever since has been and still is the general guardian of said minors; that the defendant *Grand Lodge* has in its possession a reserve fund exceeding $20,000; that before the commencement of the trial of this action said defendant paid to the plaintiffs $536.07, the amount admitted to be due upon said policy, without prejudice to the rights of plaintiffs to continue said action for the sum of $463.93 and interest thereon, denied by defendant to be due; that at its annual session in August, 1909, said defendant adopted an amendment to its by-laws to the effect that all members of said order who were such prior to the 1st day of March, 1898, should be advanced to their attained age as of that date, or in lieu thereof be given the following options: First, the privi-

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lege of paying in cash the amount they ought to have paid into the benefit fund had they been charged the present table of rates from the time they were initiated into the order to the 1st day of March, 1898, to wit: that they should be charged one payment a month at the age at which they were initiated at the rate provided by the present table of rates, against which they should be credited with the amount they actually paid during that period of time, and the balance should be the deficiency; second, that said members may have said deficiency charged against their benefit certificate with two and one-half [per cent.] simple interest so long as the same remains unpaid, with accrued interest thereon, which deficiency, with interest at the time of the death of said member, should be deducted from the face of his benefit certificate, and that said by-laws should apply only to members who were initiated into the order before March 1, 1898; that pursuant to the above by-laws the grand secretary of said defendant did about September, 1910, compute the amounts of said alleged deficiencies to be charged against the respective policies of members who joined before March 1, 1898, and that the amount so computed as a deficiency against the policy of Claus Jaeger was $363.93; and that said secretary issued a printed circular in which each member was requested to signify his choice whether he would pay the deficiency in cash, or would suffer the same to be deducted, with two and one-half per cent. interest, from the amount of his policy at his death; that said Claus Jaeger never acquiesced in said amendment and did not manifest any choice as to whether he would pay cash or suffer the same to be deducted from the amount of his policy; that before the commencement of this action the plaintiffs duly demanded of defendant payment of the amount of $1,000 named in the policy, which payment was refused.

The court concluded that said by-law of 1897, which required every member then belonging to said order and every future member to submit to a deduction of ten per cent., or

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$100, at his death from his $1,000 policy, to be paid into a reserve fund, and that only the remaining $900 should be paid to the beneficiary or beneficiaries of such policy, was and is unreasonable and void as to said Claus Jaeger and all members who joined said order prior to the passage of said law, but that since, in and by the written declaration made by said Claus Jaeger for the substitution of said six children as beneficiaries in lieu of his wife, who had died, he requested that ten per cent., or $100, of the amount of the policy be deducted from such policy and paid into the reserve fund of said *Grand Lodge,* he, said Claus Jaeger, consented to such deduction and thereafter was, and these plaintiffs now are, estopped from questioning or disputing the right of the *Grand Lodge* to deduct said $100 from the amount of said policy; that said amendment of its laws enacted by said defendant at its session in 1909, to the effect that each member of said order who had joined prior to the 1st day of March, 1898, should be required to pay the difference between the total amount of assessments he had paid from time of initiation to said 1st day of March, 1898, and the amount which he would have paid had he paid the highest rate of assessment then payable by him according to the then present rates of assessments, or to suffer such deficiency to be deducted from the amount of his policy with two and one half per cent. interest added at the time of his death, was and is unreasonable and void; that there is now due and owing from the said defendant to the plaintiffs the sum of $363.93, with interest thereon from the 12th day of April, 1910.

Judgment was entered in accordance with the findings of fact and conclusions of law, from which this appeal was taken.

For the appellant there was a brief by *O'Connor, Schmitz, Wild & Gross,* and oral argument by *A. L. Schmitz.*

For the respondents there was a brief by *Scheiber & Orth,* and oral argument by *C. A. Orth.* They cited *Wuerfler v. Trustees Grand Grove,* 116 Wis. 19, 92 N. W. 433; *Ledebuhr*

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v. Wis. T. Co. 112 Wis. 657, 88 N. W. 607; *Bruger v. Princeton & St. M. Mut. F. Ins. Co.* 129 Wis. 281, 109 N. W. 95; *Baumann v. Metropolitan L. Ins. Co.* 144 Wis. 206, 128 N. W. 864; *Langan v. Supreme Council,* 174 N. Y. 266, 66 N. E. 932; *Beach v. Supreme Tent,* 177 N. Y. 100, 69 N. E. 281; *Weber v. Supreme Tent,* 172 N. Y. 490, 65 N. E. 258; *Hale v. Equitable Aid Union,* 168 Pa. St. 377, 31 Atl. 1066; *Newhall v. Supreme Council,* 181 Mass. 111, 116, 63 N. E. 1; *Gaut v. Supreme Council,* 107 Tenn. 603, 64 S. W. 1070, 55 L. R. A. 465, 470; and other cases.

KERWIN, J. The facts in this case as found by the court are undisputed. They appear in the foregoing statement of the case.

Error is assigned upon the conclusions of law. We are reminded by the learned counsel for appellant of the great importance of the principles involved in this case to fraternal societies generally, and we approach the consideration of the case fully conscious of the fact that the legal principles involved are far reaching in their importance to all fraternal associations.

The deceased, Claus Jaeger, became a member of the lodge in 1879 and continued to 1888, when under a new arrangement the certificate under consideration was issued, by the terms of which the defendant promised to pay $1,000 to the beneficiaries provided for upon the death of said Claus Jaeger, and the said Claus Jaeger, by the terms of said certificate, promised to "comply with the laws, rules and regulations now governing this order and its beneficiary fund, and with all such as may hereafter be enacted to govern said order and fund." The deceased paid all dues and complied with all rules, regulations, and by-laws except that he refused to agree to the $100 deduction from the face of his policy by the by-law of 1897, and also refused to comply with another by-law, passed in 1909, giving two options, one to pay a sum in gross

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to be ascertained by advancing his payments from the time he entered from $1.60 per month to $2.75 per month, and charging the difference upon the policy or certificate, or by deducting such amount from the face of the policy when paid, as more fully appears from the statement of facts. The effect of this by-law, as will be seen by examination of the facts found, was to scale down the certificate or policy by charging up from the time the deceased obtained his certificate in 1888 a sum aggregating $363.93, together with $100 ordered deducted by the first by-law above referred to, making a total cut from the face of the certificate of $463.93. But, as found by the court below on sufficient evidence, the deceased consented at the time of change of beneficiaries to the $100 cut, therefore the plaintiffs cannot complain on that account.

The main question, therefore, for determination is whether the defendant could charge the $363.93 against the certificate in suit. The court below held that it could not, and that such amount was due to plaintiffs in addition to the $536.07 tendered by defendant. The case turns upon the power of the defendant to pass the by-law under which it claims the right to impose the burden upon its members. It will be remembered that the burden imposed upon deceased and his certificate or policy is a charge of $2.75 per month from the time of the issuance of the certificate up to 1909, less the amount which he had paid during that time after deceased had paid the regular dues imposed by the defendant up to that time, namely, $1.60 per month. The effect of the by-law is to take, as we have seen, $363.93 out of the $900 due on the policy by a retroactive cut after deceased had paid the dues imposed and complied with all the rules and regulations of the defendant from the time of issuance of the certificate until 1909, a period of over twenty years. The appellant's claim is that the provision in the certificate to the effect that the deceased will comply with all by-laws then existing or which may be subsequently passed gives such right, and several authorities are

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cited which it is claimed support the contention. We shall briefly refer to those chiefly relied upon by appellant.

Borgards v. Farmers' Mut. Ins. Co. 79 Mich. 440, 44 N. W. 856, was a case limiting liability in the future in case of loss by sparks escaping from a steam engine used in threshing grain.

Sargeant v. Supreme Lodge, 158 Mass. 557, 33 N. E. 650, has reference to change of beneficiaries.

Stohr v. San Francisco M. F. Soc. 82 Cal. 557, 22 Pac. 1125, held that a by-law passed limiting benefits after continuous payments for six months was valid. The by-law clearly related to future benefits and referred to a matter over which the company had control and power to limit payments by by-law, and in no way violated any contract relations between the parties, because permission to do what was done and change the by-law in that regard was a part of the contract, and it was said in the case that the change could not be retroactive. The contract was held to mean that in case of sickness the member is to receive payments, subject to the power of defendant to change the provision authorizing such payments so far as future payments are concerned.

Parish v. New York P. Exch. 169 N. Y. 34, 61 N. E. 977, holds that a by-law diverting a fund from the purpose specified in the charter is unreasonable and void, because an attempt to divert the fund to a different purpose after the fund had been accumulated by payments for a series of years. The case is not in favor of appellant's position, but rather against it.

Supreme Commandery v. Ainsworth, 71 Ala. 436, holds certificate to be a contract not subject to impairment, but accepted subject to the laws of the order then in force or thereafter enacted, but was silent on the question of suicide; and it was further held that a by-law enacted after the issuance of certificate, declaring it void if the member should take his own life, was valid.

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Caldwell v. Grand Lodge, 148 Cal. 195, 82 Pac. 781, relates to change of beneficiaries, and it was held that where the original by-law allowed any person to be named by a member as beneficiary, a change in the by-laws requiring one to be designated as a member of the family or related by blood, or "who shall be dependent upon him," is reasonable.

Supreme Lodge v. Kutscher, 179 Ill. 340, 53 N. E. 620, is a case holding that a by-law forfeiting claim for the death of a member by suicide or intoxication is reasonable and binding upon a member joining before its passage who contracts to be bound by subsequent by-laws.

Fullenwider v. Supreme Council, 180 Ill. 621, 54 N. E. 485, involves right to change rate of assessment by subsequent by-law. It does not appear, as we understand the opinion, that the subsequent by-law had any retroactive effect; moreover the case is ruled by a bare majority, three judges dissenting.

Olson v. Court of Honor, 100 Minn. 117, 110 N. W. 374, is where a by-law passed subsequently to the issuance of certificate limiting the benefit, in case of suicide, to five per cent. of the face of the certificate for each year during continuance of membership in the society, was held unreasonable and void as to existing members. This authority is against appellant's contention.

Counsel for appellant also cites the following Wisconsin cases: *Schmidt v. Supreme Tent,* 97 Wis. 528, 73 N. W. 22, which is a case where the subsequent by-law was against prohibited occupation. *Hughes v. Wis. O. F. Mut. L. Ins. Co.* 98 Wis. 292, 73 N. W. 1015, is where there was a subsequent by-law against suicide, rendering the policy void. *Loeffler v. Modern Woodmen,* 100 Wis. 79, 75 N. W. 1012, is where there was a by-law against entering into a prohibited business. *Thomas v Covert,* 126 Wis. 593, 105 N. W. 922, seems to be against appellant's contention, because it recognizes the rule that an agreement or certificate similar to the one in question

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must in terms or by implication authorize the change in the contract, otherwise the subsequent by-law effecting such change is void.

A careful examination of the foregoing cases will show that they are not controlling in favor of the appellant and some of them are against appellant's contention. The case of *Wuerfler v. Trustees Grand Grove,* 116 Wis. 19, 92 N. W. 433, rules the instant case. That case is so strongly in point both on facts and upon principles enunciated that we quote at length from the opinion. At page 26 the court said:

"Respondent did not possess unlimited authority to change its plan of insurance, giving the change retroactive effect, under the reserve power, made a part of the insurance contract, to make changes in the rules, by-laws, and regulations of the order. Such a reserve power is held to warrant only reasonable variances of insurance contracts,—variances required, in the judgment of the order, in those matters of detail necessary or advisable in carrying out efficiently the fundamental principle or scheme of insurance, not changes destroying it. Obviously, changes in the by-laws, rules, and regulations regarding the execution of a plan of insurance are quite different from changing the plan itself and nullifying all contracts entered into under it, as was done in this case. The essential features of the plan of insurance here were that each certificate holder's beneficiary should receive $1,000 upon and at the maturity of his contract, and that a fund should be accumulated by assessments upon the membership in the order sufficient for that purpose. The way was undoubtedly open for the order to make reasonable changes respecting the hazards members might subject themselves to, and in regard to the number and amount of the assessments, the time of payment thereof, the effect of default in such payment, the notice required of assessments to put members in default, and many other matters of detail that might be mentioned. But after a member had paid assessments for a long period of time, contributing to accumulate money to meet the matured obligations of $1,000 each to beneficiaries, a change in the constitution of the order (the word 'constitution' is here used as synonymous with 'by-laws') rendering the certificate at ma-

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turity, instead of worth $1,000, worth an indefinite amount and probably not half that sum, cannot seriously be considered a reasonable change in rules, regulations and by-laws as regards existing contracts."

This court has held that where there is a conflict between the policy and the laws of the order, the policy controls. *Ledebuhr v. Wis. T. Co.* 112 Wis. 657, 88 N. W. 607; *Bruger v. Princeton & St. M. Mut. F. Ins. Co.* 129 Wis. 281, 109 N. W. 95.

The change attempted to be made here by deducting $363.93 from the policy amounted to an abrogation of the contract. In *Langan v. Supreme Court,* 174 N. Y. 266, 66 N. E. 932, the benefit certificate had been issued for $5,000 on the death of plaintiff. After plaintiff had become a member, the by-laws were amended so that on the death of plaintiff only $2,000 should be paid. In an action involving the validity of such amendment the court said:

"The action of the defendant, in the attempted amendment of the by-law, which was in force when the plaintiff joined the association and received his certificate, was wholly ineffectual to deprive him of any rights which had become vested. It was beyond the power of the defendant to affect the obligation expressed in the certificate, without the consent of its holder."

To the same effect are *Beach v. Supreme Tent,* 177 N. Y. 100, 69 N. E. 281; *Weber v. Supreme Tent,* 172 N. Y. 490, 65 N. E. 258; *Hale v. Equitable Aid Union,* 168 Pa. St. 377, 31 Atl. 1066.

In *Newhall v. Supreme Council,* 181 Mass. 111, 63 N. E. 1, an attempt was made, by the adoption of a subsequent by-law, to cut the amount of the certificate from $5,000 to $2,000, and, although the usual promise was contained in the certificate to comply with subsequent by-laws, it was held that the full sum mentioned in the certificate, $5,000, could be recovered. See, also, *Gaut v. Supreme Council,* 107 Tenn. 603, 64 S. W. 1070, 55 L. R. A. 465, where it was held that an

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agreement by the holder of a benefit certificate to be governed by laws subsequently enacted does not authorize the reduction of the benefit called for in the certificate after payment has been made for years on original value.

We are of opinion that the by-law making the rebate from the policy of $363.93 was unauthorized and void. The by-law making the ten per cent. cut, or $100 on the $1,000 certificate, was assented to by deceased when he made the change of beneficiaries and cannot be questioned here.

Some other questions are raised by respondents which they claim are sufficient to defeat the appellant, on the ground that the by-laws referred to are unreasonable because all members, new and old, were not put upon the same basis as to rates. On this point attention is called to the following authorities in addition to those already cited: *Strauss v. Mutual R. F. L. Asso.* 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605; *Benjamin v. Mutual R. F. L. Asso.* 146 Cal. 34, 79 Pac. 517; *Ebert v. Mutual R. F. L. Asso.* 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 857. Whether this last contention as to discrimination between old and new members as to rates in the future is sufficient to defeat the by-law making new rates, independent of the retroactive cut on old members, we need not and do not decide, because the by-law scaling down the certificate by a rebate of $363.93 cannot be upheld, and the by-law attempting to accomplish such purpose is unauthorized under the contract and void. The judgment of the court below, therefore, is right and must be affirmed.

By the Court.—The judgment is affirmed.

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SCHMIDT, Appellant, vs. CITY OF MILWAUKEE, Respondent.
SAME, Respondent, vs. SAME, Appellant.

April 4—April 23, 1912.

Appeal: Lack of jurisdiction in tribunal below: Admissions: Municipal corporations: Improvements: Change in street grade: Damages: Assessment: What constitutes a "lot:" By whom determined: Milwaukee city charter: Police power: Depression of railroad tracks: Viaducts: Special verdicts: Questions not submitted: Waiver: Evidence: Weight: Expert testimony.

1. The rule that the appellate tribunal acquires no jurisdiction if the tribunal whose act is sought to be reviewed had none, is to be applied with caution and discretion; and in any case no mere admission that proceedings are void can show that the tribunal below had no jurisdiction of the subject matter, for the same reason that no consent could confer such jurisdiction.
2. Thus, where the notice of appeal from an assessment by a board of public works of the damages to abutting property by reason of a change in the grade of a street stated generally that the proceedings were illegal and void, such statement, although assented to on behalf of the city, did not deprive the circuit court of jurisdiction of the appeal. Jurisdiction in such cases is dependent upon and governed wholly by the statute.
3. Sec. 8 of ch. VII of the Milwaukee city charter does not limit the right of the lotowner, in the case of a change of a street grade, to damages only for the purpose of reducing benefits or as an offset against benefits.
4. Lots fronting on the improvement, with respect to which an assessment of benefits and damages is provided for in secs. 7, 8, ch. VII, Milwaukee city charter, are not limited to lots designated on the plat which actually abut upon the street in question; but such a "lot" may consist of parcels forming a distinct homestead or other inclosure, a messuage or unit of property which fronts on the improvement, but which is laid out, occupied, or inclosed without reference to platted lines.
5. But where two parcels are separated by a public street or alley, no matter how they are occupied or used, they cannot under the provisions of the Milwaukee city charter be considered as a unit for the purpose of assessment.
6. Under such city charter the board of public works determines in the first instance what constitutes a lot fronting on the improve-

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ment in the particular case; but on appeal the circuit court considers and determines the matter *de novo*.

7. Where the board of public works assessed damages to nine lots in a body owned by plaintiff, and on appeal the jury found no damages to the property as a whole but awarded damages as to the one lot which abutted on the street affected by the improvement, that constituted a determination by the jury of what part of the plaintiff's property constituted a "lot" fronting on the improvement and affected or injured thereby.

8. Where plaintiff's property fronted upon two cross streets the grades of which were changed, but was divided into separate parcels by a public alley, and he took a separate appeal from the award of damages as to each street, which appeals were consolidated for the purpose of trial, it was proper upon such trial to keep separate and submit separately to the jury the questions as to the damages resulting from the change of the grade of each of said streets.

9. Where the streets involved were crossed by railroad tracks and the changes in grade were made in connection with the depression of such tracks pursuant to an ordinance passed by the common council under its police power, and consisted in a slight elevation of each of the bridges or viaducts over such railroad tracks, the drying up of a spring and the loss of a sidetrack, which were attributable to the depression of the railroad tracks, were properly excluded from the award of damages against the city arising from such changes of grade.

10. Ch. 376, Laws of 1901, authorizing cities of the first class to construct viaducts over railroad tracks and to negotiate with the railroad companies for the payment of a proportion of the expense of such construction, is a grant of additional power, not a limitation upon the police power given by the Milwaukee city charter (ch. IV, sec. 3, subd. 48) to control the location of railroad tracks and to require railroad companies to construct and maintain at their own expense such bridges, viaducts, etc., as the common council may deem necessary.

11. The provisions of said ch. 376, Laws of 1901, relative to the assessment of damages sustained by the owners of abutting property, are applicable only when the city has determined itself to construct a viaduct, and not in a case where, under the police power, the council has ordered a railroad company to depress its tracks and construct a viaduct or overhead crossing at its own expense.

12. Where the council by ordinance required a railroad company to depress its tracks and to construct bridges or viaducts at street

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crossings, and so fixed the depth of the depression that the viaducts must be elevated above the former street grades, thus making necessary the raising of the grades of the streets for approaches to such viaducts, a subsequent ordinance providing for such raising of the grades was an independent and separate exercise of power on the part of the city, and in the assessment of damages by reason of such change of grade no damages growing out of the acts of the railroad company in attempting to comply with the earlier ordinance are within the jurisdiction of the board of public works or of the circuit court on appeal from such board.

[13. Whether in such a case the landowner has a right of action against the railroad company on account of damages resulting from the depression of the tracks, or whether all such damages were compensated in the original purchase or condemnation of the land by the railroad company, is not determined.]

14. Where the grade of a street is raised, the right of the owner of abutting lands to damages is the same whether the change in grade is made by earth filling or by the extension of a viaduct in front of such lots.

15. On appeal a party cannot complain of the failure of the trial court to submit in a special verdict a question as to a special issue, where he did not request such submission and it would be inconsistent with his theory of the case as presented below.

16. The damages which the owner of abutting lots is entitled to recover for a change in the grade of the street are measured by the depreciation in value caused by the change. The cost of restoration, though a factor in estimating such damages, is not a proper item of damages to be found separately, since to allow the recovery of such cost would be to ignore the benefits which should be offset.

17. In fixing the damages to abutting property from a change of street grade, the jury are not bound by the opinions or arguments of experts, particularly where their estimates are based upon unwarranted premises or upon reasons fanciful and ingenious rather than sound.

APPEALS from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Prior to April 15, 1902, the plaintiff owned a number of city lots in the north half of block 220 in the Eighteenth ward of *Milwaukee* upon which he operated a plant for cutting, sawing, and dressing stone, with the necessary buildings and

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appliances. Bounding this block on the west was Bartlett street, on the north North avenue, and on the east Oakland avenue, all graded and improved streets. Through the middle of the block, running north and south and parallel with Oakland avenue and with Bartlett street, was a public alley fourteen feet wide. On the west side of this alley and between it and Bartlett street, running east and west and beginning at the North avenue line and lying parallel therewith and numbering from there south, were lots 39 to 31 inclusive, owned and occupied by the plaintiff. Considering platting alone, only lot 39 abutted on North avenue, but all these lots were used and occupied together as part of the stone-dressing plant. On the east of this alley, between it and Oakland avenue, running east and west and beginning at the north line of the block, were lots 1 to 6 inclusive. Crossing North avenue diagonally at grade, running southeast, and cutting off the greater parts of lots 1 and 2, about half of lot 3, and parts of lots 4, 5, and 6, was the right of way of the Chicago & Northwestern Railway, which, proceeding southeasterly, crossed Oakland avenue diagonally and at grade. In the middle of this right of way were double tracks of the railroad. The plaintiff owned those fractions of lots 1, 2, 3, 4, and 5 between the alley mentioned and the railway right of way, and also lot 6, only the southerly ten feet of which touched the boundary of Oakland avenue. Between the north part of lot 6 and all of the other lots mentioned and the boundary of Oakland avenue extended the right of way of the said railroad. A sidetrack connecting with the westerly track of the railroad company near the west boundary of Oakland avenue swung over the right of way and in upon plaintiff's premises. Only a very small part of the west end of lot 1 belonged to the plaintiff and abutted on North avenue, and there was evidence from which the jury might have found that this was taken away by the excavation for the depression of the railway

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tracks and the building of the necessary retaining wall or for the construction of plaintiff's new sidetrack.

On April 15, 1902, there was enacted by the city authorities an ordinance requiring the depression of the roadbed and tracks of this railroad and for bridges over said roadbed and tracks where they intersected the streets. The first section of the ordinance required the said railroad company to depress the plane of its roadbed and tracks in the manner, to the depth, and upon the conditions specified in said ordinance. Detailed directions followed, including the manner of construction of bridges over all depressed roadbed and tracks on North avenue, Oakland avenue, and elsewhere. The plans of these bridges were to be approved by the board of public works of the city, but the railroad was required to build them. It was provided by sec. 5 that nothing in the ordinance should be construed to require the railroad company to assume or pay any damages to adjacent property or business caused by the depression of its tracks or change of grade of any street, etc., and that in consideration of the railroad company's construction of the bridges at the street crossings and of its acceptance of the ordinance and agreement to do and perform all things required to be done and performed by it under the ordinance, all damages, if any there were, should be adjusted and paid by the city, and the city should intervene in suits brought for the recovery of such damages and relieve the railroad company from defending the same and assume and pay all judgments recovered therein. The ordinance contains other provisions not relevant here. The effect of this ordinance was, by means of such depression and bridges, to create overhead crossings instead of the former grade crossings, and, apparently in order to lighten the burden of the railroad company, the depth of depression was so fixed that the level of the bridge, viaduct, or overhead crossing at the places in question was to be three feet above the former street grade.

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On September 12, 1902, the city by ordinance changed the grade of North avenue for about a block each way from each end of the viaduct for the purpose of making an approach to the viaduct, and in like manner changed the grade at the Oakland avenue viaduct. This change of grade was three feet at the contact of the approach with the viaduct on North avenue and diminishing to zero as it receded from the bridge, and three and one-half feet at the same contact on Oakland avenue and in like manner diminishing. The actual street surface, however, in each instance was above the grade fixed by the old ordinance, so that the actual raise under the ordinance of September 12, 1902, was not equal to the difference between the former established grade and the later established grade. After the railroad company had depressed its tracks and built its bridges or viaducts and on or about April 18, 1904, the common council of the city, upon report of the board of public works, adopted a resolution to grade and curb the streets and plank the sidewalks on North avenue from Bartlett street to Kenilworth Place, which is about the east boundary of Oakland avenue. This was said to be "for the reason that on account of the depression of the railway tracks in the immediate vicinity the said street has become inadequate, inconvenient, and unsafe for the public use thereof, for the passage of foot passengers and vehicles, and for the drainage of water therefrom." This grading and curbing of the street and planking of the sidewalks were to be done at the expense of the city and without special assessment on the abutting lots, so that the only thing the abutting lotowners are legally concerned with is the damages arising from change of grade. A like resolution related to the approach to the Oakland avenue viaduct or overhead crossing.

An assessment of benefits and damages was ordered and such assessment was made and confirmed, there being two separate proceedings, one for Oakland avenue and one for North avenue, each also including other streets. No part of the cost

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of paving streets or restoring streets or sidewalks was to be charged to the abutting owners, and this assessment of benefits and damages appears to have been entirely formal, apparently in endeavor to comply literally with the charter of the city, which requires the fixing of damages by the board of public works for change of grade to be made at the time of assessing benefits. The damages for change of grade to lots 1, 2, 3, 4, and 5 were not assessed at all, presumably because these lots did not front on the street on which the improvement was made. Lot 6 was indicated as belonging partly to the railroad company and partly to the plaintiff, and it was found that there were no benefits and no damages to this lot. This assessment related solely to the change of grade on Oakland avenue. No damages were awarded on account of the change of grade on North avenue to lot 1. Lots 31 to 39 inclusive were assessed for the change of grade on North avenue, and it was found that there were no benefits and $100 damages to be paid to the owner. From each of these assessments of damages the plaintiff took a separate appeal to the circuit court for Milwaukee county; in the North avenue case on the ground that the amount of $100 adjudged and allowed to him as owner of said lots for damages, costs, and charges arising from the alteration of the grade of the street is insufficient, inadequate, and unjust and all of said proceedings are illegal and void. From the Oakland avenue assessment a like appeal was taken which stated the grounds of the appeal as follows:

"The failure and refusal to adjudge and allow him as such owner of said lots, by said corrected assessment confirmed as aforesaid, any sum of money whatever for damages, costs, and charges arising from the alteration of the grade of the street and for the deprivation of the right to use and the use of the spur track, extending northwesterly over lot 6 from the Chicago & Northwestern Railroad Company's tracks and right of way, is unjust, in that there should have been adjudged and allowed to him as such owner of said lots, and particularly of the south twenty-two feet of lot 6 in said block, a sum

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of money for damages, costs, and charges arising from the alteration of the grade of said street and said deprivation; and that all of said proceedings are illegal and void."

After these appeals were lodged in the circuit court the latter by order consolidated the appeals. The jury found a special verdict as follows:

"(1) Were lots 1, 2, 3, 4, 5, and 6 in block 220, considered as one parcel, affected or injured in consequence of the alteration of the grade of Oakland avenue opposite lot 6, excluding from your consideration the loss of sidetrack and any other injury resulting from the depression of the tracks of the railroad? *A.* No.

"(3) Were the plaintiff's premises, including lots 1 to 6 and 31 to 39 in block 220, considered as one parcel and for the purpose for which they were used at the time the grade was changed, affected or injured by the change of grade of Oakland avenue, excluding from your consideration the loss of sidetrack and any other injury resulting from the depression of the railroad tracks? *A.* No.

"(5) Were lots 31 to 39 in block 220 affected or injured by the change of grade of North avenue, exclusive of the damage caused by the depression of the track or other injury resulting therefrom, considering the use being made of them at the time such alteration of grade was effected? *A.* No.

"(7) Were the plaintiff's premises, including lots 1 to 6 and 31 to 39 in block 220, considered as one parcel and for the purpose for which they were then used, affected or injured by the change of grade of North avenue, excluding from your consideration the loss of the spring and any injury resulting from the depression of the railroad tracks? *A.* No.

"(9) If you shall be of the opinion that lot 6, considered separate from all the other lots of the plaintiff, was affected or injured by the change of grade on Oakland avenue, then answer: What sum will compensate the plaintiff for such injury to said lot 6? *A.* None.

"(10) If you shall be of the opinion that lot 39, considered separate and apart from all the other lots of the plaintiff, was affected or injured by the change of grade of North avenue, then answer: What sum will compensate said plaintiff for such injury to said lot 39? *A.* $225.

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"(11) Did any of the plaintiff's property abut on the bridge on Oakland avenue after the erection of said bridge? *A.* Yes.

"(12) How much were said abutting lots damaged by said bridge? *A.* $225.

"(13) Did any of the plaintiff's property abut on the bridge on North avenue after the erection of said bridge? *A.* No."

For the plaintiff there were separate briefs by *Aarons & Niven,* attorneys, and *Moritz Wittig,* of counsel, and the cause was argued orally by *Mr. C. L. Aarons* and *Mr. Wittig.*

For the defendant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.*

TIMLIN, J. The defendant makes two points on its appeal: (1) The circuit court erred in denying defendant's motion to dismiss the appeals from the board of public works to that court. (2) That part of the judgment which awards damages caused by the bridges is erroneous. The first is in the nature of a preliminary objection; the second can best be considered in connection with the errors assigned by plaintiff's counsel.

The notices of appeal made by the plaintiff each end with a sort of sweeping condemnation to the effect that "said proceedings are illegal and void." The city by counsel assents to this and apparently thinks that it has in this way gained a point on its adversary and brought the matter within the rule sometimes applied that an appeal confers no jurisdiction upon the appellate tribunal if it can be shown that the tribunal below had no jurisdiction. Counsel for the city attempts to support this further by pointing out with reference to North avenue that only lot 39 west of the alley abuts on that street, while the damages to lots 31 to 39 inclusive were found by the board of public works, and further that the lots are found to have been damaged notwithstanding no benefits were found.

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The objection here goes to jurisdiction of the subject matter, because it must be obvious that the parties were before the court. There is a rule of law applicable to some appeals under which the appellate tribunal acquires no jurisdiction provided the tribunal whose act is sought to be reviewed had none. *Stringham v. Winnebago Co.* 24 Wis. 594; *Birdsall v. Kewaunee Co.* 124 Wis. 576, 103 N. W. 1. This rule is, however, to be applied with caution and discretion and rests upon a construction of the statutes authorizing the review of the decision below; but in any case no mere admission that proceedings are void could show that the tribunal below had no jurisdiction of the subject matter, for the same reason that no consent could confer such jurisdiction. An admission that a tribunal has no jurisdiction of the subject matter is like an admission that no statutes exist when we have the public statutes before us showing the contrary. Jurisdiction is the power and authority conferred by law upon the officer or tribunal, and in order to ascertain its existence and scope we must go to the statutes. The idea that such power and authority should become lost or nonexistent by slip of the tongue or pen or even by express stipulation is, to say the least, very novel and fundamentally unsound. The statutes dispose not only of this alleged error but of several others relied upon by the plaintiff for reversal of this judgment.

The somewhat complicated situation presented by the facts is further complicated by the contentions and variant theories of counsel. On the part of the appellant *Schmidt,* who appears by two different counsel who file separate briefs and present separate theories of the case, it is contended (1) that the damages caused by the depression or sinking of the railway tracks should not have been excluded from the recovery; (2) that damages for loss of sidetrack and the drying up of a spring on the premises should have been included; (3) that the plaintiff's property should have been considered as a unit and the inquiry directed to an investigation of the damages

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caused to it as a whole; (4) that after the consolidation of appeals the damages from the change of grade on Oakland avenue and those arising from the change of grade on North avenue should not have been considered separately but should have been lumped together; (5) that if the plaintiff's premises should not be considered as a unit it should at least have been considered as two units, one lying east and one west of the alley, for the purpose of estimating damages, and not at all considered by separate lots; (6) that the court should have submitted to the jury the damages caused by the change of grade of North avenue to lot 1 because a part of that lot owned by plaintiff fronted on North avenue; (7) that the charge of the court was incorrect in that it conflicted with the foregoing claims and in that it did not permit the jury to consider certain testimony relative to the cost of restoration, but confined them to damages for depreciation in value caused by the improvement, and was incorrect in other particulars; (8) that the verdict is not supported by evidence and is inconsistent and perverse; (9) that errors occurred in the admission and exclusion of evidence, and that there were other detail errors not necessary to notice, but nearly or remotely related to some or all of the foregoing points.

The city charter, sec. 8, ch. VII, upon conditions there mentioned, gives to the owner of any lot or parcel of land which may be affected or injured in consequence of an alteration of the grade of the streets compensation therefor. The board of public works is authorized, at the time of assessing benefits caused by street improvements, to consider, determine, and assess against the lots which they may deem benefited by the proposed improvement, to the amount of such benefits, the damages, costs, and charges, including the cost of such improvement, arising from such alteration of grade. A construction of this section which might limit the right of the lotowner to damages only for the purpose of reducing benefits or as an offset against benefits was rejected in *Milwaukee T. Co. v. Mil-*

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waukee, 146 Wis. 245, 131 N. W. 439, and in *Filer & S. Co. v. Milwaukee,* 146 Wis. 221, 131 N. W. 345. Sec. 8 does not expressly mention abutting owners or abutting lots, but it does permit the board to "consider, determine, and assess" the damages to the lots which they deem benefited. Sec. 7 speaks of these lots as lots fronting on the improvement. This has been generally understood to refer to abutting lots, but not solely with reference to their platted identity. The plat is only one factor in the result; occupancy as a single inclosure and conveyances are others. *Loewenbach v. Milwaukee,* 139 Wis. 49, 119 N. W. 888. There can rarely arise under this statute questions not readily solvable by common sense. Lots fronting on the improvement may be either lots as designated on the plat or parcels forming a distinct homestead or other inclosure, a messuage or unit of property which fronts on the improvement, but which is laid out, occupied, or inclosed without reference to platted lines. This description is illustrative, not exhaustive. It is, however, an error to contend that in ascertaining whether or not a given parcel is a lot fronting on the street or an assessable unit you could cross other street or alley lines. It is also manifestly erroneous to attempt to apply the rule relative to damages in condemnation cases to damages caused by change of grade. We must always bear in mind that where a new right is given by statute together with a remedy for its enforcement, that remedy is exclusive, except in some cases where the party injured has been prevented by the wrong of the other party from resorting to such statutory remedy. Where two parcels are separated by a public street or alley, no matter how they are used or occupied, they cannot under these provisions of the charter be considered as a unit for the purpose of assessment. The reason is obvious. The board of public works is authorized to determine and assess the damages arising from such alteration of grade against the lots which are liable to be assessed for benefits. This means, first, lots fronting on the improvement, and, second, lots not sepa-

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rated from the improvement by another public street or alley. Hamilton, Special Assessments, § 217 and cases; Id. § 541 and cases. The owner of any lots of the foregoing description which may be "affected or injured in consequence of an alteration of the grade" may be awarded compensation. This confers on the board of public works not only power to consider, determine, and assess the damages arising from such alteration of grade, but also to determine what constitutes a lot fronting on the improvement in the particular case. This is usually a question of fact. Not so much so, however, that the board of public works could assess damages for a lot which in no sense fronted upon the improvement or upon the street the grade of which was changed, or disregard the fact that a public street or alley intervened between a lot fronting on said street and another lot for which the owner claimed damages.

Sec. 11 of ch. VII of the city charter provides that the owner of any lot or tract of land or tenement who feels himself aggrieved by the amount of damages, costs, and charges arising to such owner from an alteration of grade may within twenty days after such confirmation by the common council appeal therefrom to the circuit court for Milwaukee county. There are many instances in the law in which an appeal is allowed from a subordinate *quasi*-judicial tribunal, or rather a subordinate tribunal exercising *quasi*-judicial power, to the regularly constituted courts. In such cases, so far as the *quasi*-judicial questions before such subordinate body or board are concerned, the circuit court takes up the matter *de novo,* determines anew for itself what constitutes a lot fronting on a street and affected or injured and the amount of damages to which the owner is entitled.

In the instant case the board of public works acted on two different assessments, one on Oakland avenue and one on North avenue. The board awarded no damages and charged for no benefits on account of the Oakland avenue change of grade and improvement. It did award on account of the North

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avenue change of grade damages in the amount of $100 to all of plaintiff's lots west of the public alley, treating this tract as a lot fronting on North avenue affected or injured by the change of grade. The damage to all these lots must include all the damage to lot 39. Upon appeal the trial court by question 5 submitted this identical question to the jury, and the jury found that, considering lots 31 to 39 together, they were not affected or injured by the change of grade, and by question 10 found that lot 39, considered separate and apart, was affected or injured by the change of grade in the sum of $225. This we regard as disposing of a question of fact, namely, what part of plaintiff's premises lying west of the alley constituted a lot fronting on the improvement and affected or injured by the change of grade. That question depended upon the practicability and feasibility of access from Bartlett street to the lots 31 to 38 inclusive; to the disposition and location and use of the buildings on lot 39; to the differences in level, if any, between lot 39 and the remainder of the tract west of the alley; to the extent to which filling or grading was necessary to reach lot 39 from the street with facility and not necessary to reach the other lots in this group; and many other items and conditions of fact which might be mentioned. It was within the jurisdiction of the board of public works to determine in the first instance that lot 39 was the lot affected or injured and fronting on the improvement. They did not do so, but found lots 31 to 39 to answer that description. It was within the province of the circuit court on appeal to find that the board of public works was mistaken and that lot 39 only answered this description. Similar considerations apply to the findings of the jury numbered 1 and 9.

By questions 3 and 7 the court submitted to the jury separately whether plaintiff's premises, considered as a whole, were affected or injured by the change of grade of Oakland avenue or that of North avenue. The jury answered these questions in the negative and therefore no harm was done in

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their submission. We think that the questions relative to the damages occasioned by change of grade on Oakland avenue and those caused by change of grade on North avenue were properly kept separate and submitted to the jury separately. They could not well be combined without confusion. It was also very proper to submit questions 5 and 10 to the jury, because these questions as stated presented an issuable matter of fact necessary to be determined by the jury. We must approve of the verdict in so far as it kept separate or tended to keep separate the damages, if any, caused by the change of grade on Oakland avenue from those, if any, caused by the change of grade on North avenue; also in so far as it permitted the jury to determine what portion of the land west of the alley constituted a lot fronting on the improvement and what portion of the land east of the alley constituted a lot fronting on the improvement. It is apparent that the loss of plaintiff's sidetrack and the drying up of the spring were not damages caused by the change of grade of these streets.

The depression of the railway tracks to a depth of about nineteen feet below their former level was ordered by the city, in the exercise of its police power, to protect life and property menaced by the danger of street crossings at grade. By subd. 48, sec. 3, ch. IV of the charter the city has power to direct and control the location of railroad tracks and to require railroad companies to construct and maintain at their own expense such bridges, viaducts, tunnels, or other conveniences at public railroad crossings as the common council may deem necessary. Ch. 376, Laws of 1901, authorizes the city to itself construct such viaducts and to enter into negotiations with the railroad company for the payment of such proportion of the expense of constructing viaducts as may be agreed upon between them. But taking subd. 48 of sec. 3 of ch. IV of the charter and sec. 6 of ch. 376, Laws of 1901, together, the police power of the city in this regard is in no wise diminished. The effect of ch. 376, *supra,* is to add to the powers of cities of the first class by giv-

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ing them the option to build these viaducts and by agreement with the railroad company share the expense of the construction of the viaducts. This is a grant of additional power, not a limitation upon the former police power. The extent of the latter power has been declared and firmly established by *Chicago, B. & Q. R. Co. v. State ex rel. Omaha,* 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481; *State ex rel. Minneapolis v. St. P., M. & M. R. Co.* 98 Minn. 380, 108 N. W. 261, 28 L. R. A. N. S. 298; *New York & N. E. R. Co. v. Bristow,* 151 U. S. 556, 14 Sup. Ct. 437. Whether the city of *Milwaukee* in its ordinance of April 15, 1902, exceeded the powers conferred upon it by said ch. 376 we need not determine in this case. By that ordinance the Chicago & Northwestern Railway Company is ordered to depress its roadbed and tracks as therein indicated. In this work of depression the city takes no part nor is it authorized to do so under ch. 376, *supra.* The city merely gives the law to and imposes the duty upon the railway company. Over the excavated ditch or valley resulting from this depression, where the same is intersected by street crossings, bridges are required to be constructed. These may be called bridges, viaducts, or overhead crossings. The railway company was required to make the excavation and build the viaducts. The latter were to be built according to plans and specifications approved by the board of public works. It is only when the city shall have determined itself to erect and construct such a viaduct that it may assess the damages sustained by the owner of abutting property in the manner provided by law for the determination and assessment of damages for the alteration of the grade of a street. The proceedings here do not bring the case within that description. The depression of the tracks to such a depth only as to require the elevation of the viaducts three feet or thereabouts over the former street grade in order that the trains could pass safely under said viaducts made necessary the raising of the grade of the streets for an approach to these viaducts. It also raised the

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street level at the place spanned by the viaduct to the extent of three feet. In a logical sense these matters were all related, but they had no legal connection. The raising of the grade of the streets was an independent and separate exercise of power on the part of the city, and the fact that it was exercised in the instant case because of the necessity or convenience growing out of some other act or order of the city would not make this all one legal proceeding. The depression of the railroad tracks and the construction of the overhead crossings or viaducts by the railroad company in obedience to law imposing that duty upon the company was not a part of the proceedings for the change of grade of the streets, nor within the jurisdiction of the board of public works in estimating damages for change of grade, and the plaintiff's demand for damages growing out of the acts of the railroad company in attempting to conform to that law was not brought to the circuit court upon appeal from the board of public works. These damages relate to a different matter, claimed by a different right, to be asserted before a different tribunal. Whether the plaintiff has any right of action against the railway company on account of such damages, or whether all such damages were compensated in the original purchase or condemnation by the railroad company, it is not necessary or proper to determine in this proceeding, to which the railway company is not and cannot be a party. It is sufficient for this case that all damages caused by the depression of the railway tracks and the mere construction of the viaducts were not within the jurisdiction of the board of public works, consequently not within the jurisdiction of the circuit court in this case on appeal from that board. We hold, therefore:

1. There was no error in excluding consideration of plaintiff's damages resulting from the depression of the railway tracks generally, including the loss of sidetrack, spring, etc.

2. There was no error in excluding damages claimed under ch. 376, Laws of 1901.

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3. There was no error in the form of verdict. On the contrary the case seems to have been very well and skilfully submitted. The third and seventh questions were unnecessarily submitted, but the answers thereunto disposed of these questions in such a way as not to affect the correctness of the final result.

On the other hand, so far as the grade of the street was raised in front of plaintiff's lots or any part thereof, the plaintiff was entitled to damages to be assessed by the board of public works, and, they failing, by the circuit court, whether its raise was accomplished by an earth filling or by an extension of a viaduct in front of such lots. *Colclough v. Milwaukee,* 92 Wis. 182, 65 N. W. 1039. The circuit court was therefore correct in submitting the eleventh and twelfth questions to the jury. If the bridge on Oakland avenue extended some appreciable distance over the boundary of the railroad right of way at the acute angle formed by that boundary and the west boundary line of Oakland avenue so as to front on any part of lot 6 owned by the plaintiff, that elevation of the street was properly considered by the court as a raise of grade. The board of public works might have so considered it, but it probably erred in deciding that the viaduct terminated at a point in Oakland avenue which left no part of lot 6 abutting on the viaduct. There was evidence to sustain the answers to questions 11 and 12. The finding of damages from this cause, as we understand the case, rests upon the proposition that the grade of Oakland avenue in front of that part of lot 6 owned by the plaintiff was raised by ordinance and that the viaduct extended sufficiently over the railroad right of way so that a small part of it was in the street in front of that portion of lot 6 owned by the plaintiff. The special verdict as submitted did not contain a finding relative to lot 1 separately. The thirteenth finding, however, is to the effect that no part of the plaintiff's property abutted on the bridge on North avenue. There appears to be evidence to support this finding. A small

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part of lot 1 owned by the plaintiff at the North avenue line, if any such part was owned, might have been dug away in the depression of the tracks or used for plaintiff's new sidetrack. The evidence is not sufficiently clear that the plaintiff had any boundary of lot 1 on North avenue to justify a reversal upon this ground. The plaintiff did not request a special question covering this point or relating to lot 1. His theory appeared to be that all the damages from the raise of grade on both streets should be thrown together and all his property considered as a unit or single lot and the damages assessed accordingly. This we consider erroneous as heretofore stated, and the plaintiff cannot now complain of the omission of a special question relative to a special issue of this kind where he made no request for such submission and the submission would be inconsistent with his theory of the case as he presented it in the court below. The finding of the jury that no part of plaintiff's property abutted on the bridge on North avenue we consider supported by evidence. This bridge on North avenue appears to extend to the southwesterly boundary line of the right of way. Beginning a little north of the south boundary of North avenue there is perceptible widening of the excavation for the plaintiff's new sidetrack which the jury may have found cut away all the small part of lot 1 remaining. Assuming that plaintiff owns some of the land under this sidetrack, that land cannot be said to be damaged by the change of grade. So that there would be no prejudicial error if there was error. We are not satisfied that this finding is erroneous. We think the instructions of the trial court were substantially correct and that the disposition of this difficult case was very skilful and that no prejudicial error occurred during the trial.

It was not proper to find separately as an item of damages the cost of restoration. That would practically entitle the plaintiff to recover without the offset of benefits. It is the net damage caused by the change of grade that the plaintiff is entitled to recover, and while the cost of restoration is a factor

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in the estimation of such damages the final award is the depreciation in value, if any, of the abutting lot or parcel caused by the change of grade.

We do not consider the verdict against the weight of evidence. There are some very extravagant claims put forth by witnesses in these change of grade cases, and the jury are not bound by the opinions or arguments of experts, no matter how plausible they may be, when there is evidence to the contrary. There is such evidence here. We find no prejudicial errors in the admission or exclusion of evidence when the controversy before the court is properly adjusted to the statutes and rules of law governing such controversies.

We find no reversible error in the instructions. They seem to be appropriate to the theory of the case entertained by the learned circuit judge, which in our opinion is the correct theory. We do not regard the verdict as perverse or even as opposed to the weight of evidence. Much of the high estimates of damages seems to be based upon unwarranted premises, such as water collecting and standing upon the plaintiff's grounds situate alongside a nineteen-foot depression and connected with city sewers; the cost of raising buildings and making new foundations, and other bases which seem to us rather fanciful and ingenious than sound.

When all is said the case amounts to this: Across the railroad right of way and upon Oakland avenue there was a change of grade not to exceed three and one-half feet at the highest point and diminishing to zero within the distance of about one side of a city square. A small fraction of this was in front of a small fraction of lot 6. The contact, if there was such, was slight, and lot 6 was not accessible from Oakland avenue at any time except over the railroad's right of way or by hugging closely the west boundary of Oakland avenue in the triangle formed by such west boundary and the southwesterly boundary of the right of way. Surely the change of grade wrought no very serious damage under such circumstances. On North avenue there was a raise of three feet at the highest point and

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sloping back to Bartlett street, where it reached zero. The actual raise was even less than this. The access from Bartlett street was unaffected. The principal damages to the plaintiff arise from the depression of the railroad tracks. Some filling of the alley was no doubt necessary to restore the former convenient connection with North avenue. The amount awarded by the jury for this tends to impress us with the good sense of the jury. Other damage claims seem to be such that the jury might upon the evidence reject them. On the whole we are unable to say that either the court or jury erred in the disposition made of these appeals. It follows that the judgment of the circuit court should be affirmed.

By the Court.—Judgment affirmed.

On June 4, 1912, the mandate was amended by adding a direction as to costs in this court to the effect that "no costs shall be recovered by either party, but the fees of the clerk of this court shall be taxed, and paid by the city."

WASHBURN, Respondent, vs. RIEMER and another, imp., Appellants.

April 4—April 23, 1912.

Negotiable instruments: Holder in due course: Time of execution: Special verdict: Immaterial finding: Omitted facts: Presumption.

The evidence being sufficient to support a finding that plaintiff was a holder in due course of the promissory note in suit, and there being a presumption in support of the judgment (under sec. 2858*m*, Stats.: Laws of 1907, ch. 346) that the trial court so found, it is immaterial that, contrary to plaintiff's testimony that the person from whom he purchased the note had purchased it from the payee two days before the day it bore date, the jury found, in answer to the only question submitted to them, that the note was not executed until the day of its date.

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APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The defendants *Riemer* and *Sullivan* made and delivered to the defendant Somers their joint promissory note dated May 30, 1907, for $200 with interest, payable on or before October 1, 1907. Somers sold the note to one Allerton, who in turn sold it to the plaintiff. At maturity the defendants refused payment, and plaintiff brought this action to recover thereon. The defendants *Riemer* and *Sullivan* answered jointly, alleging that the note was given to Somers for certain shares of mining stock which he agreed to deliver within thirty days from May 30, 1907; that said stock had never been delivered, and that the note was without consideration, and that plaintiff purchased it with due notice that no consideration had been given therefor. On the trial plaintiff testified that he first saw the note on May 27, 1907, and that it was purchased by Allerton on May 28, 1907, and afterwards and before it became due was purchased by plaintiff. Testimony was introduced by the defendants *Riemer* and *Sullivan* to the effect that the note was not executed by them until May 30, 1907, the day on which it was dated. The single question as to whether or not the note in suit was signed by the defendants *Riemer* and *Sullivan* and delivered to Somers at any time prior to May 30, 1907, was submitted to the jury, which question they answered in the negative. Judgment was entered in favor of the plaintiff and against the defendants *Riemer* and *Sullivan,* and from such judgment this appeal is taken.

The cause was submitted for the appellants on the brief of *Curtis & Mock,* and for the respondent on that of *Marshutz & Hoffman.*

BARNES, J. The question propounded to the jury was immaterial, and the trial court must have so found, because it was answered in favor of the contention of the defendants

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while judgment went for the plaintiff. Defendants made no request that any other issue be submitted to the jury; so if there were any other issuable fact or facts in controversy, we must, under the statute, presume a finding thereon in plaintiff's favor, provided there is sufficient evidence in the record to support such a finding. The note was regular on its face and negotiable in form. The plaintiff testified that one Allerton purchased it before maturity, and in fact two days before the day it bore date, for a full and fair consideration, and that plaintiff in turn purchased it from Allerton before due, for its face value, in good faith, without notice of any infirmity therein. Plaintiff also testified to other facts tending to show that he was a holder in due course under our negotiable instrument law, sec. 1676—22, Stats. (Supp. 1906: Laws of 1899, ch. 356). There was no evidence offered to the contrary, except that of the defendants *Riemer* and *Sullivan* to the effect that the note was not executed until the day it bore date. The evidence of plaintiff in reference to his purchase of the note is uncontradicted. His evidence as to when Allerton purchased the note is impeached by the verdict of the jury. But the trial court might very well conclude that plaintiff was mistaken as to the date of the Allerton purchase and that the rest of his evidence was true on all the essential points in the case, and if so such evidence was ample to support a finding by the court that plaintiff became a *bona fide* purchaser of the note in due course of business for a valuable consideration before maturity. This being so, the judgment should be affirmed.

By the Court.—Judgment affirmed.

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KURATH, Administrator, Respondent, vs. GOVE AUTOMOBILE COMPANY, Appellant.

April 4—April 23, 1912.

New trial: Constructive denial: When deemed an exercise of discretion: Appeal: Reversal: Directing new trial.

1. The constructive denial of a motion for a new trial, under sec. 2878, Stats. (Supp. 1906: Laws of 1901, ch. 100), will not be treated on appeal as an exercise of discretion where, as in this case, the trial court after the term, believing it had jurisdiction, by an order granting a new trial expressed the opinion that justice had not been done.
2. Under such circumstances, if the facts sustain the trial court's opinion that justice has not been done, the judgment should be reversed and the cause remanded for a new trial.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

Action by the administrator of the estate of Mathias Kurath, deceased, to recover damages sustained by the parents on account of the death of their minor son, aged fifteen and one-half years. The complaint alleges that on the 27th day of September, 1908, while said Mathias Kurath, in the exercise of due care, was crossing Broadway street at the intersection of Ogden avenue, in Milwaukee, he was negligently run over and killed by one William Gaston, who was at the time of the accident a servant in the employ of the defendant and acting within the scope of his authority as such servant. It further alleges that the deceased was a bright and intelligent boy, a student in the Seventh district school and in a school of fine arts in the city of Milwaukee and that he gave promise of a brilliant future as an art student; that he resided with his parents, both of whom survive him, are aged, and will soon be unable to properly support themselves; that they have heretofore received the earnings of said Mathias Kurath and were

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in part dependent upon his earnings for their support; and that by reason of the negligence of the defendant the parents of said Mathias Kurath have suffered damages in the sum of $10,000.

The answer was a general denial as to the material allegations of the complaint.

The jury found (1) that Mathias Kurath was injured while crossing Broadway at the intersection of Ogden avenue on the morning of September 27, 1908, by being struck by an automobile driven by one William Gaston, from which injuries said Mathias Kurath died; (2) that William Gaston, when he was about to turn into Broadway from Ogden avenue, and at the time of the accident, ran the automobile in question at an unreasonably fast rate of speed; (3) that said unreasonably fast rate of speed was the proximate cause of the injury; (4) that no want of ordinary care on the part of Mathias Kurath contributed to the injury; (5) that William Gaston at the time of the accident was still in the employ of the defendant; (6) that William Gaston was charged by the defendant with the duty of selling gasoline while he was in defendant's garage and collecting the proceeds of such sales; (7) that on the morning in question William Gaston did sell some gasoline to a stranger; (8) that William Gaston forgot to collect the amount due from said stranger for said gasoline upon the delivery thereof; (9) that William Gaston, after said stranger left the garage, took the automobile in question and drove with it out on the streets for the purpose of finding and collecting from said stranger the amount due for the gasoline; (10) that the defendant company allowed William Gaston, while in its employ, to run or operate an automobile; (11) that the parents of said Mathias Kurath sustained damages in the sum of $1,750, resulting from the death of their son.

The defendant moved on the minutes of the judge to set aside the verdict and for a new trial. The motion was heard

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by the court and taken under advisement. It was not, however, acted upon by the court during the term, nor was it continued. At the following term the court rendered a decision setting aside the verdict and granting a new trial, from which order the plaintiff appealed. This court held on such appeal that pursuant to sec. 2878, Stats., as amended (Supp. 1906: Laws of 1901, ch. 100), the motion was constructively overruled by the failure of the trial court to act thereon during the term, and that the trial court had no jurisdiction to act upon it at the subsequent term. See *Kurath v. Gove A. Co.* 144 Wis. 480, 129 N. W. 619. After the *remittitur* from this court reached the trial court, it sought to amend the record by showing a waiver of the requirement that the motion be decided within the term. This court held that the record could not be so amended by the trial court. See *State ex rel. Kurath v. Ludwig,* 146 Wis. 385, 132 N. W. 130. Upon the first appeal the order was reversed and the cause remanded for further proceedings according to law. Subsequently the trial court entered judgment upon the special verdict in favor of the plaintiff. This is an appeal by the defendant from such judgment.

For the appellant the cause was submitted on the brief of *Carroll & Carroll.*

Charles E. Hammersley, for the respondent.

VINJE, J. It will be seen from the foregoing statement of facts that no appeal was taken from the constructive denial of defendant's motion for a new trial. The appeal from the judgment necessarily involves the merits of that denial. *Billington v. Eastern Wis. R. & L. Co.* 137 Wis. 416, 417, 119 N. W. 127. If that constructive denial were the only action taken in the matter by the trial court on the motion we should have to deem it the exercise of its discretion adversely to the defendant. *Koch v. Wis. P. C. Co.* 146 Wis. 267, 131 N. W. 404. But the trial court after the term, believing it had ju-

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risdiction, expressed its views upon the merits of the case by granting a new trial. Though the action then taken by it was void for want of jurisdiction, the expression of its opinion upon the merits must now be deemed relevant upon the question as to the correctness of the constructive denial of the motion. The trial court by granting the motion after the term clearly indicated that the constructive denial was a mistake, and a result not in accord with its views upon the merits. This construction of the trial court's attitude towards the case is emphasized by its attempt, made in good faith, to so amend its record as to enable it to grant the motion. Such attempt was unsuccessful. See *State ex rel. Kurath v. Ludwig,* 146 Wis. 385, 132 N. W. 130. That fact, however, does not minimize the trial court's lack of belief in the merits of plaintiff's case.

In *Wilson v. Chippewa Valley E. R. Co.* 135 Wis. 18, 114 N. W. 462, 115 N. W. 330, the trial court erroneously was of the opinion that it had no power to grant a new trial, and stated that if it had a new trial would be granted. This court said:

"For this error the judgment must be reversed, and as the trial court has indicated his view of the matter and what he would have done had he not been, as he supposed, constrained by the decision of this court to the contrary, the cause must be remanded for a new trial."

The present case presents a situation where the trial court has by an order granting a new trial expressed the opinion that justice has not been done. True, such expression was made at a time when it was powerless to remedy the miscarriage of justice owing to its having allowed the term to elapse without acting upon the motion, either through forgetfulness or through an erroneous, or perhaps correct, impression that the parties waived the necessity of the motion being decided during the term. Under such circumstances, if the facts in the case sustain the trial court's view that justice has not been

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done, the judgment should be reversed and the cause remanded for a new trial. To do otherwise would be to make an innocent party suffer through the forgetfulness or misunderstanding of the trial court, or perhaps owing to the fact that a correct understanding did not appear upon the record.

A careful perusal of the evidence convinces us, as it did the trial court, that Gaston's testimony is not only incredible in itself, but is so contradicted by other credible evidence that no verdict ought to be permitted to rest upon it. Without it, plaintiff's case entirely falls. It would not add to the value of this opinion to state his testimony in detail and point out the many incredible and contradicted parts thereof.

By the Court.—Judgment reversed, and cause remanded for a new trial.

POPE METALS COMPANY, Respondent, vs. SADEK and another, Appellants.

April 5—April 23, 1912.

Sales: Brokers: Bought and sold notes: Statute of frauds: Authority of brokers: Adding specifications: Custom: Ratification: Breach of contract: Damages: Duty to minimize: Place of delivery: World market.

1. Bought and sold notes, signed by brokers who are agents for both buyer and seller and containing the terms of sale, satisfy the statute of frauds and constitute a binding contract.
2. Brokers acting for both parties to a sale of copper were authorized to insert in the contract specifications as to the particular brand and shape, where the insertion of such provisions by the broker was usual and customary in the trade.
3. Where, in such a case, the seller, upon receiving from the brokers a telegram stating the terms of the sale, wired to a third person to deliver the copper, and also wired to the brokers that he had done so, he thereby ratified the sale upon the terms stated.

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4. As a general rule, in actions for breach of executory contracts of sale the damages are the difference between the contract price and the market price at the time and place fixed by the contract for delivery, with interest from the time of the breach.
5. Upon breach of a contract for sale of copper to be delivered at a recognized world market, the principle that the buyer is bound to exercise reasonable diligence to minimize the damages did not necessarily and as matter of law require him to accept delivery, with an equalization of freight, at another place at which there was no recognized market.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action to recover damages for breach of a contract of sale of 100 tons of copper. The plaintiff is a corporation doing business in New York City. The defendants are partners doing business in Milwaukee, and both parties deal in metals. C. S. Trench & Co. are brokers in metals in the city of New York.

On March 17, 1909, the defendants inquired by telegraph of Trench & Co. whether they could sell for them ten cars of copper, late delivery March and April, to which inquiry Trench & Co. replied with a qualified affirmative. On the following day the defendants telegraphed Trench & Co. as follows:

"Sold April copper. Can offer 100 tons March twelve forty one-half Houghton, no commission, acceptance noon tomorrow."

On the same day, on receipt of this telegram, Trench & Co. sold to the plaintiff 100 tons of copper at the price named, and on the following day issued duplicate notes of sale in the following form:

"Buyers Copy (Sellers in duplicate)
"March 19, 1909.

"J. Sadek & Son, Milwaukee, Wis., agree to sell and *Pope Metals Co.,* New York, N. Y., agree to buy one hundred (100) tons, of two thousand pounds each, Prime Lake Cop-

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per, non-arsenical brand, for delivery at sellers option during the month of March, 1909, and at buyers option to take delivery, free on board cars or on dock for water transportation via the Lakes at Houghton, Mich., at the price of twelve and forty and one-half hundredths (12.40½) cents per pound. Copper to be delivered in the shape of cakes and / or wire bars and / or ingots and / or ingot bars, according to buyer's specification.

"Terms: Cash on delivery of documents giving them title to the Copper.

"CP C. S. TRENCH & Co.,
"C. J. Trench.

"Accepted .....
.....
"(Sellers Signature)
"(Buyers in duplicate)"

On the 18th of March, immediately after the sale, Trench & Co. telegraphed the defendants as follows:

"Sold hundred tons March Prime Lake, buyers specifications as to shapes, twelve forty and one-half Houghton, Mich., advise parties from whom you are receiving to deliver to *Pope Metals Company* and wire us by whom such delivery will be made. Answer quick."

One of the broker's sale notes was sent to the plaintiff and one to defendants. Plaintiff signed its note, returned it to Trench & Co., who sent it to the defendants. The note sent to the defendants was retained by them until the trial. It appears that the defendants did not actually have the copper at Houghton, but had a contract with the New York Metal Selling Company to deliver 100 tons of copper at Milwaukee, and they assumed that their vendor would by their direction make delivery at Houghton. They therefore, on receipt of Trench & Co.'s telegram of March 18th, wired the Metal Selling Company to deliver the 100 tons of copper to the plaintiff at Houghton, and also wired Trench & Co. as follows:

"Wired New York Metal Selling, delivery one hundred ton March copper."

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On March 19th Trench & Co. wrote the defendants as follows:

"Enclosed we beg to hand you contract covering the 100 tons of Lake Copper sold for your account yesterday. Will you kindly write your acceptance on same and return to us, and we will forward you buyer's acceptance very soon.

"We note that the copper will be delivered by the New York Metal Selling Co., and trust you are making arrangements with these people to have the delivery made to the *Pope Metals Co.*, in accordance with the sale.

"Thanking you for past favors, and awaiting your further orders, we beg to remain," etc.

The New York Metal Selling Company declined to make delivery of the 100 tons of copper to the plaintiff at Houghton, and in fact made actual delivery of the same to the defendants at Milwaukee, according to their contract. The defendants, being unable to make delivery at Houghton, offered to deliver the same at Milwaukee and equalize the freight between Milwaukee and Buffalo. The freight from Milwaukee to Buffalo was four cents per hundred pounds greater than from Houghton to Buffalo. It had been stated by the plaintiff in one of its letters that it desired the copper in barrels at Houghton "for forwarding by steamer to New York via Buffalo." The plaintiff declined to accept the defendants' offer, and insisted on delivery at Houghton according to the contract. Such delivery being finally refused by the defendants on April 6th, the plaintiff, after notice to the defendants, purchased 100 tons of copper at Houghton at the lowest market price, viz. $12.75, which amounted to $690 more than the contract price.

The trial court held that the contract was a valid contract, and that the only question was as to the amount of damages. This question being submitted to the jury, a verdict for $690 damages was returned and judgment was rendered for the plaintiff thereon, from which the defendants appeal.

B. F. Saltzstein, for the appellants.

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For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and oral argument by *Jackson B. Kemper.*

WINSLOW, C. J. The trial court was right in holding that there was a binding contract shown as matter of law. The brokers were the agents of both parties, and the bought and sold notes signed by them and containing the terms of the contract satisfied the statute of frauds. *Bibb v. Allen,* 149 U. S. 481, 13 Sup. Ct. 950; *Newberry v. Wall,* 84 N. Y. 576; 20 Cyc. 256.

It is said, however, that the brokers were not authorized to insert in the contract specifications as to the particular brand or shape of the copper. All the evidence bearing on the subject tends to show that the insertion of such provisions by the broker is usual and customary in the trade, but were this otherwise it is very clear that the contract was expressly ratified and approved by the defendants' telegram of March 18th to Trench & Co., and by their telegram of the same date to the New York Metal Selling Company, instructing them to make delivery of the 100 tons of copper to the plaintiffs in accordance with the broker's contract.

The only question in the case, therefore, was the question of the amount of the damages. It cannot be denied that as a general rule, in actions for breach of executory contracts of sale, the damages are the difference between the contract price and the market price at the time and place fixed by the contract for delivery, with interest from the time of the breach. *Vogt v. Schienebeck,* 122 Wis. 491, 100 N. W. 820; *Southern F. & G. Co. v. McGeehan,* 144 Wis. 130, 128 N. W. 879.

The appellants invoke the well established principle that it is the duty of the plaintiff, in case of a breach of contract, to exercise reasonable diligence to minimize the damages, and argue that, as it appears that it gave directions to the effect that the copper was to be delivered at the docks in Houghton

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ready to be forwarded by steamer to Buffalo, it was plaintiff's duty to accept it at the docks in Milwaukee ready for forwarding by steamer to Buffalo, provided that the defendants equalized the difference in freight, amounting to $80, which they offered to do.

The court is of the opinion that it cannot be said as matter of law that the plaintiff was bound to accept delivery at Milwaukee with an equalization of freight. This was not an isolated purchase of certain articles of merchandise to be delivered at Buffalo, and which might just as well be shipped from Milwaukee as from Houghton; but it was, on the other hand, a transaction in the market of the world, where it is well known that certificates and bills of lading are generally used to discharge contracts, and that the right to call for delivery of a staple commodity at a recognized world market is generally of much greater value than the right to call for delivery at a place where there is no recognized market.

The jury in the present case found, under instructions which are not complained of, that the plaintiff's damage was $690, and we cannot say that the finding is erroneous.

By the Court.—Judgment affirmed.

GRISWOLD, Appellant, vs. CAMP, Respondent.

April 5—April 23, 1912.

Municipal corporations: Injury caused by icy sidewalk: Duty of city and of lotowner: Ordinance requiring walks to be sanded, etc.: Failure to obey: Negligence: Liability.

1. The duty of a city as to keeping its sidewalks reasonably safe for public travel does not, generally speaking, require it to obviate danger from mere slipperiness produced by natural causes.
2. At common law the owner or occupant of a lot owes no duty

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to protect travelers from danger of being injured by the slippery condition of the sidewalk.

3. A city ordinance requiring, under penalty, the owners or occupants of lots to keep icy sidewalks in front thereof sprinkled with ashes, sawdust, or sand, was not intended to require such persons to aid the city in the performance of a duty resting upon it, and does not, in case of the failure of such an owner or occupant to comply therewith, render him liable, on the ground of negligence, to a person injured by reason of the slippery condition of the walk. *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, distinguished.

4. Whether failure to obey a statute designed to conserve human safety is negligence *per se* depends upon the presumed legislative intent.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Action for a personal injury. January 25, 1910, plaintiff, while walking on a sidewalk in front of premises occupied by defendant in the city of Milwaukee, stepped, by reason of the walk being covered with ice and there being no sand, ashes, or other material thereon, slipped, and was injured. There then existed in the city of Milwaukee a duly adopted ordinance requiring every person circumstanced as defendant was to keep the walk in front of his premises sprinkled with ashes, sawdust, or sand, under penalty of not less than $1 nor more than $5 and $5 per day for the time the failure to obey the ordinance should continue. Defendant so failed and on that account plaintiff claimed he was liable to her for her injury. The court dismissed the case upon the ground that the ordinance did not impose any such liability on defendant.

For the appellant there was a brief by *Rossiter Lines,* attorney, and *Lawrence A. Olwell,* of counsel, and oral argument by *Mr. Lines.* They cited, among other cases, *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, 64 N. W. 1041; *Mueller v. Milwaukee St. R. Co.* 86 Wis. 340, 56 N. W. 914; *McCall v. Chamberlain,* 13 Wis. 637.

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For the respondent the cause was submitted on the brief of *F. A. Geiger.*

MARSHALL, J. The duty of a municipality as regards keeping its sidewalks reasonably safe for public travel, does not, generally speaking, include obviating danger to travelers using such walks from mere slipperiness produced by natural causes. *Cook v. Milwaukee,* 24 Wis. 270; *Salzer v. Milwaukee,* 97 Wis. 471, 73 N. W. 20. So the purpose of the ordinance in question was not to require the owners or occupants of lots to aid the city in the performance of its duty. There was no common-law duty of a person circumstanced as respondent was to protect travelers from danger of being injured by such slippery condition. That is too clear for argument. Where then is there any legitimate basis for the claim of liability?

Appellant seems to think the case turns on the validity of the ordinance and so seeks to demonstrate that it is reasonable, and, therefore, valid. It may well be conceded that the ordinance is valid; but it does not, in terms, attempt to create such a liability as is sought to be enforced, even if such liability could be so created. Does a mere police regulation of the nature under consideration,—one requiring the occupant of a lot to do something the city is not liable to do in order to render its sidewalks reasonably safe, and imposing on him a penalty in favor of the city for failure to comply therewith,—manifest, clearly, a purpose to render a person guilty of such failure also liable on the ground of negligence, as claimed in this case? If any such liability be discoverable, it must be found in the intent and spirit rather than in literal sense.

That such an ordinance as the one in question, or a charter provision of similar import, does not contemplate any consequence to the wrongdoer but those specifically mentioned therein, is ruled by *Sommers v. Marshfield,* 90 Wis. 59, 62 N. W. 937; *Selleck v. Tallman,* 93 Wis. 246, 67 N. W. 36;

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Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654; and other cases. Even where the thing required of the lotowner is essential to performance of a municipal duty, the mere creation of a duty, as in this case, and failure to perform, is penalized, it has uniformly been held, as the cited cases show, that a person who has received a personal injury by reason of a condition which would not have existed but for such failure, cannot recover compensation from such owner, because no such purpose can fairly be read out of the ordinance.

In *Sommers v. Marshfield, supra,* the difficulty involved here was a vital matter. It arose under an express charter provision, making it the duty of one, circumstanced as respondent was, "to keep all sidewalks around" his premises "free from snow, ice, rubbish, boxes, barrels, or other obstructions interfering with persons traveling thereon," and imposing a penalty for failure to perform such duty. The court held that such requirement did not create a duty rendering such owner or occupant primarily liable for an injury to a traveler caused by breach of such duty,—that in an action for recovery for such injury such person was not even a proper party.

In the above cited case, this court is in harmony with authorities elsewhere. *Vandyke v. Cincinnati,* 1 Disney, 532, is cited, commonly, by text-writers as giving the correct rule. It was there held that such an ordinance as that in question can be enforced only by the penalty prescribed; that a violation thereof does not subject the guilty party to a civil action at the suit of a private person.

Counsel rely on the doctrine that failure to obey a statute designed to conserve human safety, is negligence *per se.* That is not of universal application. It depends upon the presumed legislative intent. In all cases where the doctrine has been applied there was a manifest purpose to create the liability or make a rule of evidence as to an existing duty. Such was the case in *Smith v. Milwaukee B. & T. Exch.* 91 Wis.

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360, 64 N. W. 1041. There the ordinance dealt with a situation, where, by statute, the municipality was in duty bound to keep the sidewalks in a reasonably safe condition for public travel, and persons doing work contemplated on premises adjacent to the street, were in duty bound to conduct their operations with ordinary care for the safety of persons lawfully using the walk. The ordinance required the party responsible for the work on adjacent property to aid the city in performing its duty and to do the particular thing as essential to ordinary care on his part. The ordinance did not create any liability; that existed independently of any legislation. All the ordinance did was to regulate the performance of an existing duty. Courts have not gone so far as to construe any such ordinance as that in question as creating a liability such as the one claimed.

By the Court.—The judgment is affirmed.

BROWN, Respondent, vs. CONNERS, Appellant.

April 5—April 23, 1912.

Master and servant: Injury to servant unloading vessel: Unsafe working place: Changes incident to work: Assumption of risk: Warning of danger.

1. The work of unloading freight from a vessel being accompanied by risks and hazards springing from the constantly changing and shifting conditions which arise as the work proceeds, and it being impossible for the employer to keep the changing working place of the employees engaged in such work free from the hazards and dangers incident thereto and created by themselves, such employees are presumed to know and assume them as risks of the employment.
2. So *held*, where an employee was injured by the fall of a pile of sheet steel which he with others was engaged in unloading from the deck of a vessel, the situation and arrangement of

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the pile, its relation to the working place, and the danger of its falling over being obvious and as readily comprehended by the employee as by the foreman in charge of the work.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

This is an action for damages for personal injuries suffered by the plaintiff while employed by the defendant as a laborer in unloading freight from the package freighter Clarion in the Menomonee river canal in Milwaukee harbor. The falling over of a pile of sheet steel piled on the deck of the boat caused plaintiff's injuries. The defendant is engaged as a contractor in the business of loading and unloading cargoes at various ports on the Great Lakes from boats plying between these ports. Previous to working for the defendant the plaintiff had been a stoker and oiler on coal and ore boats. At the time he was injured, December 2, 1909, he had been working for the defendant for about three months. He had never handled sheet steel before the time of the accident.

Two piles of sheet steel, between four and six feet high, consisting of sheets twelve or thirteen inches wide and eight or nine feet long, had been placed about the center of the deck, parallel with the length of the boat. One end of the piles was right at the gangway, along which the freight was being carried from the boat. Several carloads of boxes of freight surrounded these piles of sheet steel, and it was necessary that some of this be removed before the sheet steel could be reached. The packages along the sides of the piles of steel were removed so as to clear the piles of sheet steel and to make a place for the workmen to handle the sheet steel. One of the piles of sheet steel had been almost removed from the boat when the foreman for the defendant ordered the plaintiff to go to the end of the other pile of sheet steel farthest from the gangway to assist in removing the pile. The plaintiff, standing at the side and near one end of the piles of sheet steel, with the assistance of another worker at the other end, would re-

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move one, two, or three sheets from the pile and place them upon the shoulder of a third workman. This third workman would carry the sheets from the boat. Two or three such loads had been taken from the pile at which the plaintiff worked when the pile fell over toward the plaintiff. He testified that he could not escape because of the boxes piled around the place in which he was working. The pile fell upon him, injuring one of his legs so badly that it was necessary to remove it. The accident occurred between 6 and 7 o'clock in the evening. The foreman urged the men, and particularly the plaintiff, to hurry the unloading so that the boat might be ready to depart. There was a light in the gangway, which lighted the end of the pile away from the plaintiff. There was a light five or six feet back of the place where plaintiff worked, but it is not clear that the light from it fell upon the pile of steel. The foreman for the defendant stood in the gangway near that end of the pile of sheet steel away from the plaintiff.

There was evidence that, just before the pile fell over, a tug passed in the canal and that the boat swayed from the movement of the water caused by the passing tug, that the gang plank required readjustment after the tug had passed, that the removal of the cargo from the hold of the boat before removal of the freight from the deck would tend to make a boat unstable and liable to rock easily, and that the cargo had been so taken from the hold.

The jury found that the defendant did not furnish the plaintiff a reasonably safe place in which to work; that the foreman for the defendant did not exercise that degree of caution in the work of unloading the boat for the protection of the plaintiff which ordinarily careful persons exercise under the same or similar circumstances; that the defendant negligently failed to warn the plaintiff of any danger which the defendant in the exercise of ordinary care ought to have known; that each of these three negligences was the proximate

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cause of the plaintiff's injuries; that the plaintiff ought not in the exercise of ordinary care to have known of the danger; that the place in which the plaintiff was working when injured did not become unsafe from causes incident to and commonly occurring in the employment in which plaintiff was engaged; and that the plaintiff was not guilty of contributory negligence. The damages were fixed at $10,000.

The court gave the plaintiff the option to remit $2,000 from the damages awarded or to submit to a new trial. Plaintiff elected to take judgment for $8,000 and costs, and judgment was rendered accordingly. This is an appeal from the judgment so rendered.

For the appellant there were briefs by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Oscar W. Kreutzer,* attorney, and *James D. Shaw,* of counsel, and oral argument by *Mr. Kreutzer.*

SIEBECKER, J. The appellant contends the court erred in submitting the case to the jury for decision, because the evidence fails to show that the defendant and his servants were guilty of any want of ordinary care which caused plaintiff's injury. The trial court was of the view that the evidence tended to show that defendant's representative, in charge of the business in which plaintiff was engaged as a laborer, failed to exercise ordinary care, and the court therefore submitted to the jury the inquiries whether or not the defendant was guilty of negligence in failing to furnish plaintiff a reasonably safe place in which to work, and whether or not he was guilty of negligence in failing to warn the plaintiff of dangers incident to plaintiff's work and not open and obvious to a person of ordinary intelligence and knowledge while exercising ordinary care in the performance of such service. It is manifest from the facts established by the evidence that from its nature the work of unloading freight from the boat was accompanied by risks

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and hazards springing from the constantly changing and shifting conditions that arose as the work proceeded. Under such circumstances it is impossible for the master to follow up the progress of the work and keep the changing working place free from the hazards and dangers incident to the progress of the work, and he is therefore not subjected in law to liability for the injuries a servant may sustain on account thereof. The danger of injury to the servant under such conditions springs from the continual changes produced by the work and therefore naturally inherent in and incident to the employment, and the servant is presumed to know and assume them as risks of the employment. See note to *Citrone v. O'Rourke E. C. Co.* (44 Colo. 472, 98 Pac. 634) 19 L. R. A. N. S. 340. It is obvious from the situation presented in the instant case that the danger to plaintiff's safety from the falling steel sheets was a transitory peril, which was occasioned by and arose from the changing conditions incident to the execution of the work in which plaintiff was engaged, and hence it is within the exception to the rule by which the master is required to furnish the servant a reasonably safe working place. The facts of the case show that the peril complained of was caused by the progress of the work of unloading the boat and that the case is within the rule of *Strehlau v. John Schroeder L. Co.* 142 Wis. 215, 125 N. W. 429, and the cases cited in the opinion on page 217. It must be said here as declared in that case:

"In the light of these authorities it is entirely obvious that the conditions which caused the place where plaintiff worked to be unsafe were not provided by the master, but had been created by the very force of men of which plaintiff was one."

All of the men engaged to unload the boat were engaged in the common work of removing the freight from the boat. To accomplish the task, the condition of their working places had necessarily to be changed and adjusted continually to meet the varying exigencies of this process. It is obvious that no foresight could provide against the dangers springing from the

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conditions incident to such changes and that no warning could be given. In such an employment the employee of mature years and intelligence must be held to appreciate the hazards and risks created by the changing conditions of his work, and it follows that he assumes them as a part of the service.

It is urged by the respondent that the foreman's knowledge of the danger was superior to that of the plaintiff. We find no basis for this claim. The situation and arrangement of the pile of sheet steel at which he was working and the relation of the working place thereto were certainly as well known to the plaintiff as to the foreman. They were open and obvious to the eye of every person engaged in the work of unloading the boat and could certainly be noticed and comprehended as readily by the plaintiff as by the foreman. Indeed, it appears that the plaintiff was so circumstanced that the dangers of which he complains could be readily observed by him and his attention would be as readily attracted to them as that of the foreman. Nor is there any force in the claim that the plaintiff, whose attention was directed to the performance of his work under the urgent orders of the foreman to make haste, was in a less favorable position than the foreman for observing the danger of the pile of sheet steel falling over. This danger was so open and obvious that there would be no marked difference in the opportunities of the plaintiff and the foreman for observing it. A mere glance at the situation and condition of things disclosed them all, and informed the observer of the condition of the place wherein the work was to be done, the nature of the piling of the sheet steel, and the danger of its falling over from the movements of the boat caused by the action of the water or any other force. To require the defendant to give warning of such a condition would be to compel the defendant to protect the plaintiff from dangers concerning which it must be held the plaintiff, in the exercise of reasonable care, would be fully as well informed as was the defendant. We find no evidence establishing defend-

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ant's liability, and the motion to direct a verdict for the defendant should have been granted.

By the Court.—Judgment reversed, and the cause remanded with directions to grant defendant's motion to direct a verdict and to dismiss the complaint.

CARROLL, Appellant, vs. MANIERRE, Respondent.

April 5—April 23, 1912.

Landlord and tenant: Description in lease: Ambiguity: Intention of parties: Estoppel: Trespass.

Plaintiff's father, by a lease drawn for him by the plaintiff, leased to defendant a "dwelling house, known as No. 185 Farwell avenue, . . . and the premises thereof and appurtenances pertaining thereto, being located on the north thirty feet of the aforesaid premises." Some years before, the father, then owning sixty feet frontage on said avenue, on the north thirty feet of which stood the dwelling house in question, had conveyed the south thirty feet to the plaintiff, but the deed was not recorded until after the giving of the lease in question. Upon evidence showing the above and other facts it is *held* that the lease was intended by the parties thereto to cover only the north thirty feet, and that plaintiff was not estopped to assert title to his own land as against defendant, and, being in constructive possession thereof, to maintain an action for trespass.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

This action was brought to recover damages for trespass committed upon the land of plaintiff. The action was tried by the court without a jury, and the court found that the plaintiff was the owner of the land in question, and being desirous of selling the property caused to be erected upon the same a board sign offering the property for sale, and that the defendant unlawfully entered upon the premises and took

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down and removed the sign and disturbed the plaintiff in the use and enjoyment of said land and his occupation thereof; that the defendant at other times before and after the aforesaid unlawful entry unlawfully entered upon the land and trespassed thereon and disturbed plaintiff in the use and occupation thereof; that the defendant removed and destroyed the said sign, the property of the plaintiff, to his damage in the sum of $4.30; that the defendant is occupying premises adjoining plaintiff's land under the terms of a lease and claimed the right under said lease to use, enjoy, and occupy the land of the plaintiff.

And as conclusions of law the court found that the plaintiff is entitled to judgment for the sum of $4.30 damages and costs and that the defendant be enjoined from interfering with the property of the plaintiff.

Judgment was entered accordingly, from which this appeal was taken.

The cause was submitted for the appellant on the brief of *Quarles, Spence & Quarles,* attorneys, and *Irving Fish,* of counsel, and for the respondent on that of *Carroll & Carroll.*

KERWIN, J. It appears from the evidence that prior to 1904 plaintiff's father owned sixty feet front on Farwell avenue in the city of Milwaukee; that the yard was divided by a north and south fence near the center into a front and back yard, the rear being used as back yard and garden and inclosed by fences. On the north thirty feet of said sixty feet stands a brick dwelling house. In 1904 plaintiff's father transferred the south thirty feet to him. Plaintiff did not record his deed until about the time of the commencement of this action. At the time of the alleged trespass the defendant held possession of the dwelling on the north thirty feet under a lease prepared by the plaintiff on behalf of his father, which described the property leased as follows:

"That the said lessor does hereby lease, demise, and let unto the said lessee, the following described premises, lying and be-

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ing in the First ward of the city and county of Milwaukee and state of Wisconsin, to wit: Two-story brick veneer dwelling house, known as No. 185 Farwell avenue, attic and basement and the premises thereof and appurtenances pertaining thereto, being located on the north thirty feet of the aforesaid premises, in the First ward of the city of Milwaukee."

The lease was dated May, 1909, and was for two years. There is evidence that plaintiff in drawing said lease did not intend to include the south thirty feet; that he did not know there was a garden on the south thirty feet during 1908; that he could not say whether the back half of his lot was used by persons who lived on the north thirty feet in 1907 and 1908; that he never had anything to do with defendant. As will be seen from the statement of the case, the court below found the facts in favor of plaintiff.

The appellant contends that the findings of fact and conclusions of law do not cover two propositions of law raised in the case, namely, (1) whether the lease in question purported to grant to defendant a term in the lands owned by plaintiff; and (2) whether the acts of plaintiff in withholding his deed from record and changing the appearance of his land and assisting his father in leasing his father's land estop plaintiff from asserting title to his own land.

It is true the findings are quite general, but it does not appear that any more specific findings were asked, and we think they dispose of all the issues in the case. The court is also of opinion that the findings of fact are supported by the evidence and warrant the conclusions of law.

It is quite true that the description of the premises leased to defendant is somewhat ambiguous, but in connection with other evidence the court is of opinion, as the court below held in its written opinion in the case, that the leased premises were intended by the parties to be limited to the north thirty feet. This conclusion is further supported by the fact that the lessor could not include the south thirty feet, which he did not own, in his lease to defendant without the consent of the

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plaintiff. But it is argued that the plaintiff is estopped from asserting his title to the land against the defendant. Here again the findings and conclusions of the court below are against the appellant. Indeed, we are of opinion that the evidence is not sufficient to support findings of estoppel against plaintiff.

Several cases are cited by appellant which we have examined but do not think they reach the situation here.

People ex rel. Murphy v. Gedney, 10 Hun, 151, is a case where an alleyway was used in connection with the house leased and was pointed out at the time the lease was made as a part of the demised premises, and it was held that it passed under the language "house number 324 East Fifty-eighth street."

In *Ammidown v. Ball,* 8 Allen, 293, the deed described a lot and then followed after description of the lot, "together with all the dwelling house and building, with the appurtenances, situate thereon or thereto belonging." It will be observed that this deed not only conveys the land, the dwelling house and building, with the appurtenances, situate thereon, but also adds the words "or thereto belonging," which latter words strongly indicate an intention to convey something beyond the land and buildings thereon, and was therefore held to convey a small lot of land adjoining the granted premises, habitually used in connection with the dwelling house, and reasonably necessary to be held in connection with it.

In *Riddle v. Littlefield,* 53 N. H. 503, a store was leased, and it was held that the lessee acquired the right to use the outside walls.

Scheel v. Alhambra M. Co. 79 Fed. 821, is where the grant of a tunnel right to mine, together with appurtenances, covered the right to dump the waste rock at the mouth on the land owned by the grantor.

Other cases cited from foreign jurisdictions are no stronger in favor of appellant than those above referred to. Nor do

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the Wisconsin cases (*Bracken v. Preston,* 1 Pin. 584; *Warner v. Fountain,* 28 Wis. 405; and *Huebschmann v. McHenry,* 29 Wis. 655) reach the question here.

The plaintiff never having leased the south thirty feet, and being the owner, was in constructive possession of it, and entitled to maintain the action against the defendant upon the established facts.

The court is of opinion that the judgment below was right and must be affirmed.

By the Court.—The judgment is affirmed.

CURRY, by guardian, Respondent, vs. WISCONSIN NATIONAL BANK, Appellant.

April 5—April 23, 1912.

Banks and banking: Pledges: Negotiable paper: Holder in due course: Payment of consideration: Burden of proof: Larcenous pledge: Bankers' lien: Right and duty of setoff: Application of payments.

1. In an action by the true owner to recover negotiable bonds pledged to a bank by one whose title was defective, the burden of proof is upon the defendant to show that it acquired the title in due course, which includes proof that it paid out the money agreed to be paid therefor or parted irrevocably with a valuable consideration.
2. As between the true owner of the negotiable paper in such a case and the pledgee, the right of the latter to enforce the security is governed by the same rules of law as the right of a purchaser or indorsee of like paper; but the titles acquired are different, since where the innocent purchaser obtains an absolute title the innocent pledgee, up to the time of sale of the pledge, acquires only a lien.
3. A reserve bank which credited its correspondent bank with the proceeds of a personal note given by an officer of the latter and secured by bonds of a customer which he had wrongfully taken, had in addition to the security of such bonds a bankers' lien

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enforceable by setoff against the credit balance of said correspondent bank for the sum so wrongfully credited.

4. The pledgee bank did not in such case become a holder of the bonds in due course by the mere crediting of the proceeds of the note, nor by subsequent payment of drafts of the correspondent bank to an aggregate amount exceeding the entire credit balance at the time of the pledge, where such balance was augmented from time to time by additional deposits so that it never fell below the amount of such wrongful or mistaken credit.
5. The subsequent sending to and acceptance by the correspondent bank of a "reconcilement sheet" showing the debit and credit items appearing upon the books of the reserve bank, including the erroneous credit and the then existing credit balance, did not change the situation nor amount to an irrevocable application of the debit items to the payment of the credits thereon appearing.
6. The rule governing the presumption of application of payments will not be applied to work injustice.
7. Where, in the case stated, the pledgee bank, when it received notice of the defect in the pledgor's title to the bonds, had and at all times had had in its possession a credit balance due the correspondent bank in excess of the credit given on account of the wrongful pledge, it had the right, and it was a duty which it owed the true owner of the bonds, to revoke such credit and enforce its right of offset by cross-entry or otherwise.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Geo. D. Van Dyke, for the appellant, contended, *inter alia,* that the bonds were negotiable instruments, and an innocent pledgee was a holder in due course; that giving credit to the Mineral Point bank by Allen's direction was equivalent to paying it the money. *Montrose Sav. Bank v. Claussen,* 137 Iowa, 73, 114 N. W. 547; *Sharpless v. Welsh,* 4 Dall. 279; *Little Wolf River Imp. Co. v. Jackson,* 66 Wis. 42, 27 N. W. 625; *Sterling v. Ryan,* 72 Wis. 36, 40, 37 N. W. 572; *Lane v. Magdeburg,* 81 Wis. 344, 348, 51 N. W. 562; *Nat. C. R. Co. v. Bonneville,* 119 Wis. 222, 96 N. W. 558; *King v. Kelley,* 51 Pa. St. 36; *Pollak Bros. v. Niall-Herin Co.* (Ga.) 72 S. E. 415. The money was in fact paid to the Mineral

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Point bank because the sums paid out were applicable as payments upon the earlier credits. *Fredonia Nat. Bank v. Tommel,* 131 Mich. 674, 92 N. W. 348; *Drovers' Nat. Bank v. Blue,* 110 Mich. 31, 67 N. W. 1105; *Dreilling v. First Nat. Bank,* 43 Kan. 197, 23 Pac. 94; *Fox v. Bank of Kansas City,* 30 Kan. 441, 1 Pac. 789; *City Deposit Bank v. Green,* 130 Iowa, 384, 106 N. W. 942; *Northfield Nat. Bank v. Arndt,* 132 Wis. 383, 388, 112 N. W. 451; *U. S. Nat. Bank v. McNair,* 114 N. C. 335, 19 S. E. 361; *Kehl v. Smith,* 87 Wis. 212, 58 N. W. 244; *Strong v. Bowes,* 102 Wis. 542, 78 N. W. 921. The statement rendered and accepted between the banks was such an application by the parties. *People v. Grant,* 139 Mich. 26, 102 N. W. 226; 2 Am. & Eng. Ency. of Law (2d ed.) 450, and note 2, 471; 30 Cyc. 1237–1239.

T. M. Priestley and *J. L. O'Connor,* for the respondent.

TIMLIN, J. On or about November 1, 1905, the plaintiff left with the First National Bank of Mineral Point, Wisconsin, for safe keeping ten bonds of the United States, each payable to bearer and aggregating $5,000. September 10, 1909, Phil Allen, Jr., vice-president of the bank last mentioned and active in its management, without authority express or implied from the plaintiff and under circumstances amounting to larceny, took these bonds and pledged them with the defendant bank as collateral security to Allen's personal note for $5,000, and ordered the avails of such note to be credited to the bank of Mineral Point. The defendant bank was one of the correspondents or reserve agents of the Mineral Point bank and carried an account with the latter, and credited the latter with $5,000 in this account. This credit was according to the mode of business between the banks, which was known to Allen, and the court found that the transaction was for the sole benefit of the Mineral Point bank. This must mean that Allen, as officer of the latter bank, took such means to procure an additional credit of $5,000 for his bank in this account.

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On September 10, 1909, before the discount mentioned, the credits of the Mineral Point bank in this account exceeded its debits by $20,343.84, and after the discount by $25,343.84. Between the date last mentioned and October 18, 1909, there were numerous debits and credits in this account to the Mineral Point bank, but during all this time the latter bank had an excess of credits which never fell below $11,000, and on October 18, 1909, its excess of credits was $15,242; but disregarding credits made after September 10, 1909, and considering only items of debit to the Mineral Point bank for moneys paid out to or for it by the defendant, the aggregate of these debit items exceeded $25,343.84. On September 30, 1909, what is known in banking as a reconcilement sheet was sent from defendant to the Mineral Point bank and accepted without objection by the latter. This began with the credit balance of the Mineral Point bank on September 1, 1909, gave the items of debit and credit between that date and September 30, 1909, including the avails of the $5,000 note in question, which was specially noted "Allen note discount," and balanced the account by an entry on the debit side, "Balance $22,819.30." This of course indicated an excess of credits of the Mineral Point bank to that amount.

On October 11, 1909, the Mineral Point bank was found to be insolvent and taken in charge by the United States officials under the national bank law. On October 18, 1909, this suit in equity was brought against the defendant to restrain it from selling the bonds and to recover possession thereof, and defendant was thereby fully informed of the plaintiff's ownership of the bonds and the wrongful and larcenous act of Allen by which they came in its possession. Defendant had, however, no knowledge or notice prior to this time of the title of the plaintiff or of any infirmity in Allen's title to the bonds, and took them in pledge in due course without anything to put the defendant upon inquiry. After this action was com-

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menced the plaintiff became insane, hence her appearance by guardian.

Respondents argue in support of the judgment below that under such circumstances the defendant is not entitled to hold the bonds as against the plaintiff, because it had actually and prior to the commencement of this action and the consequent notice to it of plaintiff's title paid out nothing on account of the pledge and entered into no irrevocable agreement, and it was amply protected by the credits of the Mineral Point bank at all times. The appellant contends that under the foregoing facts (a) the defendant, by crediting the avails of Allen's note to the Mineral Point bank as requested by Allen, with the consent of the Mineral Point bank, bound itself irrevocably to Allen and to the Mineral Point bank; (b) that the making and acceptance of the reconcilement sheet on September 30, 1909, was in effect an application of all charges against the Mineral Point bank therein contained upon the earlier credit items of that bank appearing therein, including the $5,000 item in question; (c) that in any event the law would apply the debit charges against the Mineral Point bank made after September 10, 1909, to the earlier items of its credit, and by this legal application of payments the defendant had paid out the avails of the note in question to or for the Mineral Point bank; (d) that if the defendant bank had a bankers' lien upon the general balance of the bank of Mineral Point against which it might have asserted a claim for $5,000 theretofore wrongfully credited, it was not bound to do so.

We should first ascertain where the burden of proof lies, for there is no evidence showing that Allen paid a debt of his to the Mineral Point bank by this transaction, and the finding of the trial court that the transaction was for the sole benefit of the bank of Mineral Point at least suggests the contrary. It appearing clearly that the title of Allen, who negotiated the bonds, was defective, the burden of proof was upon the de-

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fendant to show that it acquired the title in due course. This includes proof that it paid out the money agreed to be paid therefor or parted irrevocably with a valuable consideration. *Hodge v. Smith,* 130 Wis. 326, 110 N. W. 192. Next we must keep in mind, for the purpose of applying a cognate rule of law, that the defendant was not a purchaser of the bonds. Many cases are cited which arose between the purchaser and the maker of negotiable paper, but they do not cover the whole question presented by a case like this. The law of pledge, with reference to the negotiable character of the instrument and with reference to the right of an innocent pledgee to enforce his security, is identical with the law of purchaser or indorsee of like paper. But the title which the innocent pledgee acquires is not identical with that acquired by an innocent purchaser. The former acquires a perfect lien, but always and up to the time of sale of the pledge only a lien; the latter acquires an absolute title. We are here speaking of the law as between the owner of the pledge and the pledgee. The case, therefore, is one in which the defendant bank had credited to the bank of Mineral Point an item of $5,000 on account of a note executed for the bank of Mineral Point and in its behalf by one of its officers which he secured by a pledge of negotiable bonds left with the Mineral Point bank for safe keeping, but which such officer surreptitiously took and pledged to secure this note. The defendant bank had these pledged bonds as security and it also had a bankers' lien enforceable by setoff against the credit balance of the bank of Mineral Point for any sum theretofore wrongfully or mistakenly credited thereon. 1 Morse, Banks & Banking (4th ed.) ch. XXII.

"If the depositor becomes bankrupt his deposit becomes security for the payment of his debt to the bank. If this debt be contingent in character, or if it be a claim for unliquidated damages arising out of a contract, then the bank may retain possession of the deposit until such time as the probable in-

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debtedness shall be ascertained, when the deposit may be set off against it." Id. § 337 and cases.

A mere credit to the indorser in his account with the bank for the price of a note purchased from him by the bank does not make the bank a purchaser in due course and for value, because it may, upon learning that a defense exists against the note, "tender the note back to the company and cancel the credit." *Manufacturers' Nat. Bank v. Newell,* 71 Wis. 309, 37 N. W. 420. Neither the equitable rule relating to the application of payments which applies payments made generally upon the earlier debit items of the account, except where such application would be unjust or inequitable, nor the implication of application of credits upon the older items of debit arising from the making and acceptance of the reconcilement sheet, affected or impaired the power of the defendant bank, at all times prior to and on October 18, 1909, to withdraw this credit from the bank of Mineral Point and so protect itself. If we assume as most favorable to the defendant that the instant case presented a situation where ordinarily and up to October 18, 1909, such theoretical application would be made, it was not irrevocable. The defendant bank could not, we think, be required to resort to a legal action to protect the plaintiff. But that is not what is expected or required. The defendant is here invoking the rule governing the legal application of payments to qualify itself to take the plaintiff's property as an innocent pledgee in due course. The rule refuses to lend its aid under such circumstances, where the defendant pledgee at the time it learned of plaintiff's title to the bonds had still in its hands, subject to its control and power of disposition, the credit which it gave the bank of Mineral Point for the avails of the Allen note and the pledged bonds. The defendant had as ample power to revoke any application of payments which it or the law had theretofore made as had the purchaser in *Manufacturers' Nat. Bank v. Newell, supra.* The rule governing the presumption of ap-

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plication of payments will not be applied to work injustice, and the reconcilement sheet was in itself no actual application of payments upon particular items, but required, to give it the effect contended for by appellant, the aid of this same equitable rule.

We are of opinion that where a pledgee acquires negotiable securities in due course from a pledgor who has no title and who in pledge makes a larcenous disposition of the securities, and the pledgee has advanced money on the pledge only by crediting, at the request of the pledgor, such moneys in the account of another for whose benefit the pledge was made and the money borrowed; and a credit exceeding this amount remains continually in such account from the time of pledge to the time of discovery by the pledgee of pledgor's want of title and of the rights of the true owner, and where the pledgee is given by law a lien against such credit balance enforceable by offset, and has the right at all times up to such discovery to revoke the credit, he is bound to make such offset by withdrawing this credit by cross-entry or otherwise. This, we think, is supported by *Hazard v. Fiske,* 83 N. Y. 287; *Smith v. Savin,* 141 N. Y. 315, 36 N. E. 338; *Le Marchant v. Moore,* 150 N. Y. 209, 44 N. E. 770; *Manufacturers' Nat. Bank v. Newell, supra;* and it is not in conflict with *Strong v. Bowes,* 102 Wis. 542, 78 N. W. 921. In the latter case notice to the pledgee came too late to enable him to protect himself.

From what has been said, it is apparent that we do not consider the defendant bank, by its transaction with Allen, bound irrevocably to Allen or to the bank of Mineral Point to continue its credit in the account of the latter. When the defendant bank agreed with Allen to credit the avails of Allen's note and the collateral bonds to the bank of Mineral Point, such agreement was necessarily influenced and affected by the law relating to dealings between banks, and subject to the right of the defendant bank to revoke that credit whenever neces-

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sary for its protection and to set off against any credit balance at any time found due to the bank of Mineral Point any demand existing in favor of the defendant bank and against the bank of Mineral Point.

It follows that the judgment of the circuit court should be affirmed.

By the Court.—Judgment affirmed.

KROPIDLOWSKI, Respondent, vs. PFISTER & VOGEL LEATHER COMPANY, Appellant.

April 5—April 23, 1912.

Torts: Joint wrongdoers: Release of one, when releases all: Writing construed: Intention: Covenant not to sue.

An instrument under seal whereby an injured person, in consideration of sums paid to him, released one of two joint wrongdoers from all actions, claims, and demands on account of the injury, and covenanted not to sue that one, but stated that it was expressly understood that said sums were received not as an accord and satisfaction for the whole injury suffered, but only as a part satisfaction thereof, is construed, in accordance with the manifest intention, not to be a technical release within the rule that a release of one joint wrongdoer releases all, but to be merely a covenant not to sue; and, so construed, it is not a bar to an action against the other wrongdoer.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The complaint in this action alleged that on or about April 23, 1910, plaintiff was employed by the Herman Zohrlaut Leather Company in its factory, and that the defendant herein delivered to said company certain carboys of acid; that plaintiff in the performance of his duties was required to remove the carboys from the yard to the store room; that the stopper in

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the neck of one of the carboys was defective, in that it was improperly placed therein, and that while plaintiff was handling the carboy the stopper blew out, the acid coming in contact with his eyes, as a result of which he lost the sight of one and sustained injuries to the other. The answer denied generally the allegations of the complaint, and as a second defense pleaded the following release as a bar to recovery against defendant:

"Received from Herman Zohrlaut Leather Company the sum of one thousand dollars ($1,000), and the payment of medical and hospital bills due Dr. George Mason and St. Mary's Hospital, amounting to $58 and $32.59 respectively, both for services rendered me on account of the below mentioned accident, and in consideration of said sums so paid, I hereby release and forever discharge said Herman Zohrlaut Leather Company, its successors and assigns, of and from any and all actions, claims and demands against said Herman Zohrlaut Leather Company, for, upon or by reason of any damage, loss, injury or suffering which heretofore has been or which may hereafter be sustained by me in consequence of an accident and injury suffered by me on or about the 23d day of April, 1910, while in the employ of said Herman Zohrlaut Leather Company, and I hereby covenant and agree with said Herman Zohrlaut Leather Company that in consideration of the payment of said sums, I will not begin or prosecute any action against said Herman Zohrlaut Leather Company on account of said accident or injuries.

"It is expressly understood, however, that said sums are received not as an accord and satisfaction for the whole injury suffered, but only as part satisfaction thereof.

"In witness whereof I have hereunto set my hand and seal at Milwaukee, Wis., this 19th day of December, 1910.

"(Signed) JOSEPH KROPIDLOWSKI. (Seal.)"

Plaintiff demurred to defendant's second defense on the ground that it did not state facts sufficient to constitute a defense, which demurrer was sustained, and from an order sustaining the demurrer this appeal is taken.

For the appellant there was a brief by *Lines, Spooner, Ellis*

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& Quarles, and oral argument by *Charles V. Quarles* and *Louis Quarles.*

For the respondent there was a brief by *Kronshage, Fritz & Hannan,* and oral argument by *T. J. Hannan.*

BARNES, J. The appellant maintains that the instrument set forth in the statement of facts is a release under seal of one of two joint wrongdoers, and that the legal effect of the document is to release and discharge both. The respondent contends that the so-called release should be construed as a covenant not to sue the Herman Zohrlaut Leather Company, and not as a technical release, and that, so construed, it does not bar a recovery from the appellant for the difference between the amount of damages sustained and the sum already paid by the Zohrlaut Company. The question is an interesting one, and it may be fairly said at the outset that, while the decided cases preponderate in favor of the contention of the appellant, the reasoning which supports them seems to be technical, artificial, and unsatisfactory.

The general rule that a release of one joint wrongdoer releases all is elementary. The same is true where the party who is wronged receives a valuable consideration from one of two or more joint wrongdoers as an accord and satisfaction of the whole injury. While the cases may differ to some extent as to the reason for the rule stated, most courts base it on the assumption that the injured party has received full satisfaction, or what is in law equivalent to full satisfaction, for the damages sustained, and that recovery should not go beyond this.

The alleged release here involved recites that the sums paid were not received "as an accord and satisfaction for the whole injury suffered, but only as part satisfaction thereof," and clearly indicates an intention on the part of the respondent to reserve the right to collect the balance of his damages from the other wrongdoer.

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The appellant contends that this portion of the document is contrary to the terms of the grant and should be rejected as mere surplusage, and that inasmuch as one of the wrongdoers was released there is a conclusive presumption of law that there was full compensation for the injury and the cause of action is wholly extinguished. Judge Cooley states the rule to be that the release of one joint tortfeasor releases all, "although the release expressly stipulates that the other defendants shall not be released." 1 Cooley, Torts (3d ed.) 235, 236, and cases cited in note 81. The author continues: "And this rule is held to apply even though the one released was not in fact liable." Page 236 and cases cited in note 82. Additional cases to the proposition covered by the first of the above quotations will be found in a note to *Abb v. N. P. R. Co.* (28 Wash. 428, 68 Pac. 954) 58 L. R. A. 297, and further citations will be found in the comprehensive notes to the late case of *McBride v. Scott,* 132 Mich. 176, 93 N. W. 243, as reported in 1 Am. & Eng. Ann. Cas. 62, 63.

Some of our own cases bear upon the subject under discussion, but do not cover the precise point involved. *Ellis v. Esson,* 50 Wis. 138, 147, 6 N. W. 518, is a leading case on the proposition that where there is partial satisfaction by one of two or more joint wrongdoers, coupled with a covenant not to sue the party making the payment, and the right is reserved to prosecute the other wrongdoer for the unpaid balance of the demand, there is only a satisfaction *pro tanto* and there is neither a release nor an accord and satisfaction of the entire damage, and recovery of the unpaid portion of the damage may be had from the other wrongdoers. The opinion also states that all the authorities hold that a technical release of one of two or more joint wrongdoers, under seal, discharges them all and is a bar to an action against any or all of them. The general doctrine of this case is approved in *Pogel v. Meilke,* 60 Wis. 248, 250, 18 N. W. 927, and again in *Bishop*

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v. McGillis, 82 Wis. 120, 126, 51 N. W. 1075, where it is said:

"The plaintiff might also agree for a consideration not to sue one, and could still maintain an action or actions against the others, unless he had executed a technical discharge under seal, or received some consideration as an accord and satisfaction of the whole injury."

None of these cases deal with a situation where the alleged instrument of release showed on its face that it was given in partial satisfaction only of the claim, and neither do they help us in determining whether such a document is in fact a release or something else. The doctrine of *Ellis v. Esson* had some support in the books when the case was decided, and it may now be said that it is the general rule.

A fair construction of the instrument involved in this case is that the respondent intended to absolve the Zohrlaut Company from further liability in consideration of the partial satisfaction by that company of the damages claimed and that respondent intended to collect the remainder of the damages from the appellant. This the latter claims cannot be done because a release of one was a release of all. If a release implies full satisfaction, then it is apparent that no such satisfaction was received and that to call the instrument a full release is a misnomer.

The rule contended for by the appellant originated with the English courts and at a time when an instrument under seal was surrounded by a strong odor of sanctity. These courts seem to have abandoned the rule and to have substituted therefor a more logical and humane one by which the whole intention of the parties is carried out. To avoid the effect of one firmly established fiction they adopted another and construed documents such as the one before us as covenants not to sue instead of releases. *Price v. Barker,* 4 El. & Bl. 760; *Selly v. Forbes,* 2 Brod. & Bing. 38 (6 Eng. C. L. 11);

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Thompson v. Lack, 3 C. B. (54 Eng. C. L.) 540; *Payler v. Homersham,* 4 M. & S. 423; *Bateson v. Gosling,* L. R. 7 C. P. 9. Some of these cases involved releases from joint and several contract obligations, but the rule is the same in tort actions, as will appear from *Duck v. Mayeu,* [1892] 2 Q. B. 511, 513. The Vermont court has held that the release of one joint tortfeasor in part satisfaction for the tort, when the release states that the sum paid is received in partial satisfaction only, does not release the other tortfeasors as to the unsatisfied portion of the damages. *Sloan v. Herrick,* 49 Vt. 327. Decisions from the New York courts can be found on both sides of the question, but the final word as expressed in *Gilbert v. Finch,* 173 N. Y. 455, 66 N. E. 133, is that an instrument which is in form a release of one joint tortfeasor, and which recites that it is given in partial satisfaction only of the damages and that the releasor intends to pursue his remedy against the other tortfeasors for the balance of the compensation to which he is entitled, will be held to be merely a covenant not to sue and will not defeat the right of action against those who are not released. The authorities are reviewed in this case, and the court in substance says that the conclusion reached is not only in conflict with the majority of the decisions of other courts, but is also in conflict with a number of decisions of the New York courts. There are other cases to the effect that an instrument such as we are considering should be treated as a covenant not to sue. *Parmelee v. Lawrence,* 44 Ill. 405, 412, 413; *Edens v. Fletcher,* 79 Kan. 139, 98 Pac. 784; *Berry v. Gillis,* 17 N. H. 9; *El Paso & S. R. Co. v. Darr* (Tex. Civ. App.) 93 S. W. 166, 169; *McCrillis v. Hawes,* 38 Me. 566; 1 Parsons, Contracts (9th ed.) 28. Referring to the general rule that a release of one joint tortfeasor releases all, it is said in 34 Cyc. 1087:

"The logical and legal soundness of this rule, however harsh its application may be in the particular case, is undoubted,

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provided the sealed instrument is once construed to be a release, but to escape the application of this principle where it would work injustice and defeat the evident intention of the parties, the modern tendency of the courts is to construe, if possible, such instruments as covenants not to sue, which accordingly do not release the co-obligors."

What has been stated as the general rule seems to be not only illogical but arbitrary, as applied to such a document as the one before us. It entirely overrides the manifest intention of the party who executes the release. Contrary to the general rule applicable to the construction of writings, it gives an effect to the instrument which is at variance with the meaning of the words used. All joint tortfeasors are severally liable for the entire damage inflicted. The respondent here might pursue the appellant and collect his entire damages from it, if he were able to establish a legal liability. Since a settlement was made with one joint tortfeasor, it may well result in a benefit to the appellant instead of an injury, because there has been partial compensation and the sum paid as such compensation cannot be again recovered. There are some cases which recognize the right of contribution between wrongdoers. 1 Cooley, Torts (3d ed.) 254 *et seq.* But if this case should be brought within the principle of the decisions there cited the respondent's cause of action would still remain, and at most the right of contribution could only affect the amount of recovery. We do not think that a construction of the so-called release should be adopted which would operate to defeat the intention of the parties instead of effectuating that intent. Neither do we think that what is at best manifestly intended to be a partial release should be held to be a complete one because the word "release," which has a technical meaning in the law, happens to be used. If a release implies full satisfaction, then it is apparent that there has not been full satisfaction, and consequently there has been no release in the

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technical sense, and that the intention of the parties will be best carried out by treating the agreement as a covenant not to sue. It follows that the order of the circuit court was right.

By the Court.—Order affirmed.

GEBHARDT, Respondent, vs. HOLMES and another, Appellants.
SAME, Appellant, vs. SAME, Respondents.

October 25—December 5, 1911.
April 6—April 23, 1912.

(1) *Cause of action: Legal wrong: Good faith.* (2) *Special verdict: Change by court: Questions not answered.* (3–17, 23, 25, 26) *Sheriffs: Duties: Liability: Arrest and bail: Custody of prisoner: Jail limits: Escape: Deputies: Nonofficial custodians: Agreement to produce prisoner: Validity: Statutes: Construction.* (18–23, 27) *Conspiracy: When actionable: Lawful acts.* (24) *Foreign statutes: Pleading: Evidence.*

A sheriff having mesne process in a civil action to arrest a defendant, who was a minor, in the presence of the latter and his father, explained the papers, left copies with the latter, and took his promise to produce the son at the sheriff's office at the county seat the next day. Before the time therefor, the father being advised that his son was not in legal custody and was free to depart from the state, in concert with another, who had knowledge of the facts, assisted him to do so. Upon plaintiff obtaining judgment and failing to collect it by execution, he successfully sued the sheriff for damages for a voluntary escape. The latter then sued the two assistants to recoup his loss. The jury found the alleged prisoner did not submit to arrest; hence they omitted to pass upon whether, at the time of the concert, the father's codefendant knew of such a submission. The court changed the finding to the affirmative, refused to grant a new trial as to the codefendant, or pass upon the omitted matter, or require the jury to pass upon whether at the time of the concert defendants knew the son was under arrest or their conduct would injure the sheriff, rendered judgment against the father for the officer's damages, and dismissed the action as to his assistant.

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Assuming, without deciding, that there was a submission to arrest, the following are the ruling legal principles:

1. If one commits a legal wrong to another he cannot avoid compensating such other for his actual legal damages because of having acted in good faith.
2. In case of a special verdict respecting two defendants, in circumstances where either or both may be liable, and a negative, resulting in nonliability as to one, which likewise exonerated the other, and so omits to answer a following vital question as to such other, and the court changes the finding as to the controlling question, the cause should not be concluded as to such other without such omitted matter being passed upon.
3. A sheriff having a warrant to arrest and hold to bail, is in duty bound to, with reasonable promptness, arrest the defendant and retain him in official custody until released on bail according to the warrant, or otherwise in due course of law, or by consent of plaintiff.
4. Failure of duty to make the arrest in the circumstances stated, renders the officer liable to the plaintiff for the pecuniary loss sustained.
5. Failure of duty as to retention in official custody, barring disturbance beyond human control, results the same.
6. In case the officer suffers an escape, whether voluntary or involuntary, he is responsible to the plaintiff within the limitations stated.
7. An officer may, at his peril, allow a defendant in arrest under mesne process freedom from official restraint, provided he produces him upon the return day of the writ or time equivalent thereto.
8. If an officer, in the circumstances stated, suspends official custody for any time, whereby he becomes unable to produce the defendant as stated in No. 7, he incurs liability for the legal damage to plaintiff, dischargeable only by payment.
9. A sheriff may entrust execution of a warrant to an official assistant, subject to personal responsibility for that assistant's conduct as if it were his own.
10. An officer having executed a warrant to arrest and hold to bail, by taking the defendant into custody, commits an actionable breach of duty by entrusting, as matter of favor or convenience, the prisoner to nonofficial control.
11. In the circumstances stated in No. 10 the instant official custody of the person is broken, an actionable escape will have occurred.
12. In case of official custody being broken as suggested in the fore-

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going, and there being an escape effected, there cannot be a subsequent escape without a new actual arrest.

13. An escape is effected in the circumstances stated, upon the principle that legal custody exists only when the custodian has a right under the warrant to possession of the prisoner.

14. Resulting from the rule stated in No. 13, upon an officer leaving his prisoner with a person having no right under the warrant to possess him, an escape is effected,—an actionable breach of official duty.

15. It being the duty of an officer having a person in custody to maintain the same till terminated by due course of law, an agreement with a nonofficial custodian to produce the prisoner into official custody at some later time, is in violation of law.

16. An agreement in plain violation of law, is void and so unenforceable by judicial remedies, regardless of whether it involves a breach of moral obligation.

17. The statutes, secs. 2697 to 2706, Stats. (1898), governing the proceedings in respect to the execution of a warrant to arrest and hold to bail, and sec. 2712, providing that, if the prisoner after having been arrested shall not have given bail or be produced in due course, the officer shall be deemed guilty of an escape and be, himself, liable as bail, in effect prohibits such officer from allowing his prisoner to go from his official custody except as provided by the written law.

18. In case of an action against one or more persons for damages for their having executed a conspiracy to do a wrongful act, the gist of the action is the damage.

19. If there be no legal wrong in what is done by two or more persons acting in concert, in that if the wrong were done by one it would not be actionable, in general, it is not rendered actionable because of having been done by a combination.

20. The foregoing is the rule where there is no substantive wrong in the combination itself.

21. In case of a consummated combination to breach a contract, the wrong, giving rise to the legal right to damages, is the breaking of the agreement, not the combination.

22. For a comprehensive rule:

"An act legal in itself, in that it does not offend against the criminal law, and the injuries are *damnum absque injuria*, regardless of its violation of moral standards, whether such act be the one perpetrated or the means used to that end, generally, if not the subject of a civil action for damages when done by one person, is not if done by many acting in concert."

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23. Where an officer, in breach of his duty, leaves his prisoner in non-official custody under an agreement that the custodian will produce him, the agreement is illegal, therefore void; hence an executed combination to breach it does not constitute a legitimate foundation for an action for damages for conspiracy.
[Syllabus by MARSHALL, J.]

On rehearing:

24. A statute of another state, although not pleaded, is admissible in evidence to prove a material fact which is pleaded.
25. Under the Michigan statute (sec. 8912, How. Ann. Stats. 1882) the jail limits in that state are the boundaries of the county in which the jail is situated.
26. At common law and under the Michigan statute (sec. 8919, How. Ann. Stats. 1882) a person arrested on mesne process may be permitted to have jail liberties without bond, at the risk of the officer, and so long as he remains within the jail limits he continues to be in official custody; but if he goes outside of such limits without the consent of the person at whose suit he is under arrest it is an escape.
27. Persons who combine to induce and assist a person to escape and who execute such purpose to the damage of the officer having him in custody, are liable to such officer for the pecuniary loss sustained by him.

APPEALS from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed as to one defendant; reversed as to the other.*

Action for loss caused by defendants, acting in concert, aiding in the departure of a person alleged to be in plaintiff's lawful custody as sheriff, from the latter's jurisdiction.

One Kitchen, deputy under plaintiff as sheriff of Cheboygan county, Michigan, had a warrant, issued in a civil action, for the arrest and holding to bail of one George Schoettle, a minor, living with defendant *Eugene Schoettle,* his father, whose residence was in Ohio, but domiciled *in præsenti* in said county. The deputy visited such domicile to execute the warrant, but, instead of taking George into actual custody, he explained to *Mr. Schoettle* the purpose of the visit, exhibited, read the papers to and left copies thereof with him, George

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being present, and accepted *Mr. Schoettle's* promise to produce the boy at the county seat the next morning in consideration of his being left at home in the meantime. The purpose of seeking to hold George to bail was to prevent his leaving the state pending litigation with him and enforce payment of any judgment which might be rendered against him. The officer relied on *Mr. Schoettle's* promise and did not serve the papers other than as aforesaid. He returned that he duly executed the writ and defendant escaped from custody. According to the promise, *Mr. Schoettle* took George to Cheboygan, the county seat, going by the train on which the officer returned, but did not deliver the boy into the officer's actual custody. Upon arriving at Cheboygan the officer went directly to his home, telling *Mr. Schoettle* to have George at the court house at 9 o'clock a. m. *Mr. Schoettle* then visited a lawyer's office in company with Thomas Martin to secure legal advice. While they were there the officer came in and after staying a while went away to make inquiries respecting proposed bail. After examining the papers and hearing *Mr. Schoettle's* statement of the case and what had occurred, the lawyer advised that the writ was void; that George was not in legal custody and was free to leave the county if he desired. Following that, Martin and defendant *Holmes,* in aid of *Mr. Schoettle* and George, took the latter by team to a railroad station outside Cheboygan county, where George took a train and left the state. Such proceedings were thereafter had in the action against George that the service of papers on him was adjudged valid and a recovery in due form was had against him for $5,000 and costs. After due return of execution thereon unsatisfied, action was commenced against the plaintiff and his bondsmen for damages for a negligent escape and judgment was rendered therein against him for $2,000 and costs. The judgment was affirmed on appeal and paid. Subsequently, the sheriff commenced this action for damages. The cause

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was submitted to a jury resulting in a verdict of which the following is an abridgment:

1. Was the officer, under his writ, authorized to take George Schoettle into his custody? *A.* Yes.

2. Did the officer, when in a position to do so, intend to take George under the writ? *A.* No.

3. If you say Yes to question 2, did the officer personally inform George of such intention?

4. If you say No to question 3, was George so informed before the conference at the law office? *A.* No.

5. Did George submit to custody by the officer? *A.* No.

6. If you say Yes to question 5, did *Holmes* know of such submission before aiding George to leave the state?

7. Did *Mr. Schoettle,* upon the officer's visit to his residence, give such officer reasonable ground to believe George had submitted to arrest? *A.* Yes.

8. If you say Yes to question 7, did the officer rely thereon to plaintiff's injury? *A.* Yes.

The court changed the answer to the second question to Yes, answered the third in the affirmative, changed the answer to the fifth question, and held that, on the undisputed evidence, as to *Mr. Schoettle* at least, George was actually placed under arrest, and that he, in legal effect, submitted thereto. On the verdict as so changed judgment was rendered against *Mr. Schoettle,* but as to defendant *Holmes* the cause was dismissed with costs.

Defendants' counsel moved the court to strike out questions 7 and 8 and the answers thereto and for judgment, which was denied.

Plaintiff's counsel moved for a new trial as to *Holmes,* in case of denial of judgment against him, because the answer to question 6 should not have been made to depend on the fifth question being answered. The court, for want of an answer to question 6 or conclusive evidence in favor of plaintiff in respect thereto, ordered judgment dismissing the case as to

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Holmes, as before stated, and denied the motion for a new trial.

Both sides appeal.

For the plaintiff the cause was submitted on the brief of *E. D. Minahan.*

For the defendants there was a brief by *Miller & Reevs,* and oral argument by *S. S. Miller.*

The following opinion was filed December 5, 1911:

MARSHALL, J. It is conceded that, unless George Schoettle was actually placed under arrest when the officer visited his father's house, and custody, in practical effect, continued down to the time he was assisted out of the sheriff's jurisdiction, there was no cause of action against the appellant *Eugene Schoettle,* and none against his codefendant, *Holmes,* unless he knew there was such custody, or ought to have known thereof, when he aided in the departure.

The point made that *Mr. Schoettle* was not liable if he did not suppose his son was under legal arrest at the time of the departure, and that the court erred in failing to submit questions on that subject, is not well taken. The real test is, Did *Mr. Schoettle,* in the legal sense, commit a wrong to plaintiff in assisting his son to leave the sheriff's jurisdiction? If so, he cannot escape responsibility, as to measurable pecuniary loss suffered, because of ignorance or want of intent to injure. Tort cases, in the civil aspect, do not depend on intent to injure, however that element may figure in the criminal aspect. Neither, in such cases, can the actual damages be mitigated or justified by elements of good faith. That rule, in general, has often been declared and applied here. *Wilson v. Young,* 31 Wis. 574; *Fenelon v. Butts,* 53 Wis. 344, 10 N. W. 501; *Grace v. Dempsey,* 75 Wis. 313, 43 N. W. 1127; *Pendleton v. Beyer,* 94 Wis. 31, 68 N. W. 415; *Candrian v. Miller,* 98 Wis. 164, 73 N. W. 1004. The rule, in brief, is this: He who is damnified by the wrong of another, regardless of that

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other's motive, is given by the law, and guaranteed, fundamentally, a remedy against such other for at least the actual loss sustained, measured by legal rules. That applies, of course, to such torts as the one claimed to have occurred, giving rise to this case. *Duncan v. Klinefelter,* 5 Watts, 141.

The trial court held that there was, in legal effect, an arrest, because the officer was with the boy, had opportunity to take him into actual custody and did the equivalent thereto, since George, of his own motion, or by that of his father, chose to consider himself in official custody in order to avoid being taken from his home and imprisoned; the father agreeing, with his consent, to be responsible for his production on the following day to give bail according to law. Whether, as the trial court held, that amounted to an actual arrest, or whether the officer by having been induced as he was to rely upon *Mr. Schoettle's* promise, estopped the latter from subsequently efficiently claiming that George was not placed under arrest, is immaterial as we view the case. If it were conceded that the court was right on both propositions, the result would be the same as if the decision were otherwise. So it may be understood, for the case, that, to all intents and purposes, George was placed under arrest at his father's house and legal custody continued from that time till *Mr. Schoettle* breached his agreement by assisting his son to leave the sheriff's jurisdiction, unless the arrest ceased to be effective when the officer intrusted performance of his duty to *Mr. Schoettle* and took the risk of the latter not keeping his agreement.

At this point it seems appropriate, though not necessary, as we shall see in the end, to respond to plaintiff's appeal for condemnation of the trial court's refusal to grant a new trial as to *Holmes,* or decide the question of his responsible participation in *Mr. Schoettle's* wrongful conduct, if there were such, in plaintiff's favor and render a judgment against both defendants accordingly. We perceive no error in the fact that the special verdict was so framed as not to require an answer to

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the question as to the participation of *Holmes* in the escape, so called, in case of failure to find that there was an arrest under the warrant. All hinged, at the best for plaintiff, on whether, actually or in practical effect, George was placed under arrest at his father's house. There was ample evidence, tending at least to show, that *Holmes* knew the whole situation when he aided George to leave the sheriff's jurisdiction. There was either a jury question on that subject or not such because of the evidence being conclusive against *Holmes*. If the latter participated in the conduct of *Mr. Schoettle,* the two became thereby equally liable. Therefore, to change the answer which was vital to *Mr. Schoettle's* side, so as to find against him and then refuse a new trial as to *Holmes* or render judgment against him because of conclusive proof of his fatal connection with his codefendant, grounding the refusal upon the very reason which, if good, required a new trial, was illogical. So if the judgment is right as to *Mr. Schoettle,* it is wrong as to *Holmes,* requiring a reversal and new trial or judgment as to him. Further we will not go, on this branch of the case, as the whole subject will be superseded by what follows.

The law imposes very important duties upon sheriffs and similar officials and holds them to a very high degree of accountability. When a sheriff has a warrant, as in this case, he is in duty bound to execute it with all reasonable promptness by taking the defendant into official custody under it and holding him securely in such custody till he shall have been released by consent of the plaintiff, or be set at liberty upon giving bail according to the command of the writ and the written law as regards the manner and form thereof, or otherwise by due course of law. If, having reasonable opportunity to make the arrest, the officer fails to do so, he is liable to the plaintiff for the pecuniary loss, at least, sustained thereby. If he executes the warrant in part by taking defendant into custody and then loses such custody by escape, for any cause

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within human control,—escape, voluntary or involuntary on his part, he is liable to the plaintiff the same as in case of a failure to execute the writ at all. Murfree, Sheriffs, § 199; Crocker, Sheriffs, §§ 600–607. The common-law doctrine in this regard is quite inexorable, and has not been relaxed in this state by statute as it has been in some jurisdictions, but has rather been supplemented here by written law. Sec. 2712, Stats. (1898). Without such relaxation the sheriff is liable for an escape, prejudicial to private rights, as in this case, within the limitations suggested even though there be no moral turpitude in the matter and only the constructive fault springing from legal responsibility for his act and the acts of his official assistants. We speak of this to illustrate the logic of the rule hereafter stated which particularly concerns this case.

True, an officer may, but at his peril, allow a defendant when under arrest on mesne process, some liberty contingent, however, upon his producing his prisoner on the return day of the writ or time equivalent thereto, if there be any; but if he permits the defendant to go at large for any length of time or illegally relaxes custody to any extent after making the arrest, whereby he is unable to produce his prisoner when required in the performance of his duty upon the return day of the writ, liability to the plaintiff for loss caused thereby arises and can be discharged only by payment of his damage.

A sheriff may entrust the execution of writs and the custody of persons taken thereunder to official assistants, being responsible for their conduct, as if it were his own. In case of their breaching official duty to his damage which he is compelled to meet, he has a right of action over against them for indemnity. This rule obviously goes no further than such assistants as are possessed of legal authority to arrest the defendant, or hold him by authority of the officer after initiation of legal custody. It does not permit of the officer entrusting custody of the prisoner to any one having no official right to restrain him, as a mere matter of convenience or indulgence.

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It follows from the foregoing, that there can be no such thing as an escape, rendering a sheriff liable for an injury to private rights, as in this case, unless there was legal custody under the warrant at the time the departure occurred. That is too elementary to require support by authorities.

Now, it is not and could not be claimed there was any escape in this case in which the defendants, or either of them, wrongfully participated, from a legal standpoint, unless it occurred at the time George departed from the sheriff's jurisdiction. If he was not then in official custody, and had not been since he was voluntarily left with his father on the preceding day, then the escape, if any occurred, happened at the latter time.

From the foregoing it must follow, on principle, that a sheriff has no authority to leave his prisoner, as in this case, to be produced by a person having no official status and so no official right to restrain him. The contrary would be out of all harmony with the dignity and responsibility of the office of sheriff. It would open the way to lax performance of official duties and inestimable mischief, to the prejudice of private and public rights. No warrant is found in the history of the matter as found in the books for an officer to leave his prisoner with a private person under a promise of the latter to continue the custody, and be held excusable for doing so, or such person being held responsible to him upon such promise. The industry of counsel, if it were turned to the matter, failed to result in citing to our attention any precedent or principle sanctioning or enforcing such a promise. On the contrary, well considered decisions exist holding that such promises are void for want of consideration and are wholly unenforceable as contrary to public policy, being in violation of the official duty of the sheriff to take and officially hold, or let to bail, or release the defendant only according to the command of the writ.

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We may well say, in passing, that the officer here did not even clothe *Mr. Schoettle* with the semblance of authority, by leaving the writ with him. Only copies were so left and that for the purpose of service, not for the purpose of conferring authority to restrain George as one under arrest. So there was a clear case, within principle and authority, of allowing a prisoner to go at large after having once been taken into custody under a writ,—go at large contrary to the command of the writ under which he was arrested.

Generally, it will be found stated, that any suspension of actual official custody once existing, as in this case, effects an escape. 11 Am. & Eng. Ency. of Law (2d ed.) 265. The officer, to perform his duty in such a case, must keep his prisoner in secure custody, not necessarily lock him up, but under official control. Murfree, Sheriffs, § 200. Leaving the prisoner in the custody of another, not an officer, as indicated, effects an escape necessarily, because of the custodian having no official authority to hold the prisoner. Crocker, Sheriffs, § 601; *Palmer v. Hatch,* 9 Johns. 329; *Browning's Ex'x v. Rittenhouse,* 40 N. J. Law, 230; *Hawkins v. Plomer,* 2 W. Blackst. 1048; *Benton v. Sutton,* 1 Bos. & Pul. 24; *Olmstead v. Raymond,* 6 Johns. 62.

Decisions of recent date relating to the subject are not numerous, rather indicating, when taken in connection with text-book authorities, that the stated rule long since became so elementary as to preclude controversies in respect to the matter reaching courts of last resort.

In connection with what has been said, it seems well to give caution against the inadvertent statement in Smith, Sheriffs, etc., at page 565, which might lead one astray. This language is there used: "Arresting one on civil process and leaving him in custody of one not an officer, is not an escape." Possibly that text-book statement was brought to the attention of the court below and affected the result, as it does not seem to have occurred that legal custody was suspended by the offi-

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cer, because of his having left his prisoner with *Mr. Schoettle.* The quoted language is out of harmony with its context. It is based on two New York decisions which we have cited. They are directly contrary thereto. The word "not" evidently was interpolated into the author's writing in the process of producing his work after the copy for the printer left his hands. In the first case the author referred to the officer, after making the arrest, through kindness and for mutual convenience, left his prisoner in the custody of the latter's two brothers. The court treated the matter very briefly, thus: "This was leaving the prisoner at large and was clearly an escape; for the two brothers of the prisoner had no authority, after the deputy had left them, to detain the prisoner. . . ."

In *Benton v. Sutton, supra,* a leading English case often cited, the officer after making the arrest left his prisoner in custody, for a time, of a follower who had no official authority. The court by EYRE, C. J., said:

"The custody of the follower, after the writ once executed, amounted to nothing; he could have no power to detain the prisoner if he had chosen to escape, and the warrant would have been no justification to him, if any mischief had happened; which reduces the case to this point, that the prisoner was found absolutely at large. . . . Cases may be put where, if the officer attempted to justify any length of indulgence, under color of the prisoner being always in his presence, the court would say that it was an escape."

BULLER, J., added:

"I think that no distinction can be made between such a case as this, and one which originates in more laudable motives. Wherever the prisoner in execution is in a different custody from that which is likely to enforce payment of the debt, it is an escape."

All the judges concurred that immediately upon the prisoner being, as matter of indulgence, left with the person not an officer,—who could have the protection of the writ in offi-

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cially restraining him, he was no longer in legal custody, but, in the eye of the law, had escaped.

It follows, logically, from the foregoing,—upon the elementary principle that an agreement in plain violation of law, is unenforceable, and the time-honored doctrine that a sheriff holding a writ, as in this case, is in duty bound to execute it with strict fidelity to its commands; and that, after taking the prisoner, to place him under nonofficial control or allow him to go at large otherwise, upon his own promise or the assurance of another that he will appear at a later time, other than such assurance as is prescribed by law; any agreement whereby the officer entrusts custody of his prisoner to another who has not authority under protection of the writ to restrain him, accomplishes a legal escape,—that the agreement relied on was and is absolutely void. The following in addition to the authorities heretofore cited so declare the law and illustrate its application: *Wheeler v. Bailey,* 13 Johns. 365; *Winter v. Kinney,* 1 N. Y. 365; *Cook v. Freudenthal,* 80 N. Y. 202; *Richardson v. Crandall,* 48 N. Y. 348; *Decker v. Judson,* 16 N. Y. 439.

In New York, it is true, a statute existed declaring agreements, other than such as are expressly authorized by law, taken by an officer in his official capacity to enable him to allow a person in his custody under arrest to go at liberty, void. But such statute was modeled after an ancient English statute and is, in the main, a declaration of a common-law rule.

In *Winter v. Kinney, supra,* it was said, in effect, that any agreement made by an officer inconsistent with his official duty whereby injury may happen to the plaintiff in the case in which the defendant is under arrest for the security of the plaintiff, is void. Many cases are referred to in the citations of an officer taking a promise in some form not provided by statute, to enable him to allow the defendant more or less liberty inconsistent with his being under actual restraint as a

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prisoner; the act in many, and perhaps most cases, as here, being out of kindness to the defendant and without thought of injuring the plaintiff or that he would be injured. All such were condemned as in breach of official duty.

In *Browning's Ex'x v. Rittenhouse,* 40 N. J. Law, 230, the court aptly remarked:

"There is little sentimentalism in the law relating to debtors in execution; and the rule is very stringent that the sheriff shall take the defendant and safely keep him so that he may have him in custody, ready to satisfy the plaintiff, though in arrests upon mesne process the officer discharges his duty if he produces the defendant on the day of the return."

We must assume, on the record, that the law of Michigan is the same as the law of this state respecting a sheriff's duty in such circumstances as those under consideration,—that is, to permit the prisoner to be at liberty after having been placed under arrest only upon his giving bail as indicated in the warrant, or the plaintiff consenting thereto, or the defendant being discharged or released in due course of law. The warrant in such a case fixes the amount of the bail. The statutes direct the manner thereof. Sec. 2697, Stats. (1898). They also provide that if the prisoner, after having been arrested, be not produced in due course, or have not given security in some one of the ways pointed out, the sheriff shall be liable, himself, as bail, upon the ground of having been guilty of permitting an escape. Sec. 2712, Stats. (1898). That is equivalent to a statutory prohibition of allowing a prisoner indulgence inconsistent with official duty and to a declaration that any such allowance, under an agreement, as in this case, is an escape and the agreement void.

How then can we escape the conclusion that the officer in taking, for the time being, the personal promise of *Mr. Schoettle* to produce George plainly violated the law, common and statute, regarding his official duty? The violation was of a

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kind, regardless of good intention, deemed from time immemorial, as we have seen, of a very dangerous prejudicial character. Sound public policy condemns such lapses, no matter if the sheriff be actuated by the best of motives. Good motives do not justify or excuse violation by a sheriff of his duty to as fully as practicable execute the writ placed in his hands for that purpose. A contract in breach of such duty is, logically, void and unenforceable.

We must hold that George Schoettle ceased to be plaintiff's prisoner before the time when he was assisted to leave the state of Michigan. There was a voluntary escape, in legal effect, the preceding day. *Mr. Schoettle* was under no legal obligation to produce his son and deliver him according to promise, however significant may appear his moral obligation to have done so. So George, not being in the sheriff's custody or under arrest in any sense on the day of the departure, committed no legal wrong to plaintiff in going away, neither did the defendants in assisting him in the matter.

The mere fact, if there be such, of there having been concert between the defendants did not create a liability for damages. In a civil action against two or more persons, charged with having conspired together to do a wrongful act to the damage of another and executed the agreement in that regard, the gist of the action is the damage, not the conspiracy. The latter is material only to fix joint liability when otherwise perhaps some of the parties charged would not be liable at all. If there be no legal wrong in what is done by such a combination then there is no legal, that is recoverable, damage. Such damages are only incident to a violation of some legal right. If the agreement between *Mr. Schoettle* and the deputy sheriff were valid, then the agreement between the defendants to breach it, and concurrence in carrying that out, would fall within the rule rendering concert in doing an unlawful act actionable civilly in case of the purpose of the agreement be-

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ing carried out to the damage of another. The unlawful act, primarily, would be the breaking of the valid contract, not the concerting together to do it.

This court pointed out the danger of confusing conspiracy in its criminal aspect with conspiracy having no reference to the commission of a crime or not being in itself a substantive criminal offense, in *Martens v. Reilly,* 109 Wis. 464, 84 N. W. 840; *State ex rel. Durner v. Huegin,* 110 Wis. 189, 254, 85 N. W. 1046; *Randall v. Lonstorf,* 126 Wis. 147, 105 N. W. 663; *White v. White,* 132 Wis. 121, 128, 111 N. W. 1116; and *Jones v. Monson,* 137 Wis. 478, 119 N. W. 179. As said in the latter case, there is no such thing as a civil action for conspiracy, but there is a well known right of action for damages for a wrong committed by many persons concerting together to do an unlawful act, the joint liability springing from the concert without, necessarily, all persons charged having participated in the overt acts. In *Martens v. Reilly, supra,* the rule on the subject, latterly several times approved, respecting the matter under discussion was phrased thus:

"An act legal in itself, in that it does not offend against the criminal law and the injuries are *damnum absque injuria,* regardless of its violation of moral standards, whether such act be the one perpetrated or the means used to that end, generally, if not the subject of a civil action for damages when done by one person, is not if done by many acting in concert."

We do not overlook the element of parental authority which existed in this case. That afforded capacity, to some extent, for *Mr. Schoettle* to keep his promise made to the officer, but under any one of many circumstances which might have arisen, none whatever. Parental authority gave *Mr. Schoettle* no legal right whatever to imprison his son as one liable to restraint as a violator of law, or to deprive him of his liberty for the purpose of turning him over to the officer. Regardless of such authority, the escape was complete and liability

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of the officer created when George was abandoned to nonofficial custody, leaving no basis for liability for what occurred on the following day. Had the writ been left with *Mr. Schoettle* it would not have furnished him any justification for resisting the taking of the boy on another writ held by some other officer or any other taking of George from his custody. All the authority incident to official control was due from the officer to the plaintiff in the action in which the writ issued. So far as he could, he violated his duty in that regard,—contracted away, innocently it is true, the custody which duty required him to retain, and then sought to recoup the damages he brought upon himself, through an action upon the void agreement. We may well say, in passing, that while he cannot succeed in doing that, the result reflects no credit on *Mr. Schoettle.*

The foregoing leaves the judgment without any support in the law or the evidence. The precise ground of our decision does not seem to have been presented below or to have been in the mind of counsel for appellant here, though the exceptions saved are broad enough to cover it so far as exceptions were necessary therefor. The judgment below should have gone in the defendants' favor on the motion therefor after verdict.

By the Court.—On plaintiff's appeal the judgment as to defendant *Holmes* is affirmed. On the appeal of defendant *Schoettle* the judgment is reversed, and the cause remanded with directions to enter judgment dismissing the action as to him with costs.

SIEBECKER, KERWIN, and BARNES, JJ., dissented.

A motion by plaintiff for a rehearing was granted on January 30, 1912, and the cause was reargued on April 6, 1912.

E. D. Minahan, for the plaintiff.

For the defendant there was a brief by *Miller & Reevs,* and oral argument by *S. S. Miller.*

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The following opinion was filed April 23, 1912:

MARSHALL, J. If George Schoettle was not at large,—had not already escaped from custody of the officer, when he was assisted by *Eugene Schoettle* and *Edmund Holmes* to leave the state, then the logic of the first result here requires a different one because of change of premises.

By common-law rules a person once arrested by mesne process, so long as kept within jail limits, is in official custody, and upon being permitted to go outside thereof without consent of the person at whose suit he should be in custody, there is a voluntary escape. In general, a person arrested on mesne process may be permitted by the officer at his own risk to have jail liberties, or he may take a bond to indemnify against risk in permitting the indulgence. In either case, there is no escape. Such is the common-law rule,—Crocker, Sheriffs, § 592; 11 Am. & Eng. Ency. of Law (2d ed.) 269,—and it has been incorporated into most Codes in connection with a variation of the common rule as to what constitutes jail limits. That is true as to our statute. Secs. 4321–4323, Stats. (1898).

So it is important in a case of this sort, to determine the state of the law in the particular jurisdiction where the cause of action arose as regards what constitutes jail limits. Commonly it is the prison bounds. In the absence of any statute that would be the test. In case of a suit prosecuted, as in this instance, and no proof of a statute fixing jail limits in the neighboring state, the presumption would be that they are the same as here,—the sides of a square, the center of each side being one mile from the jail.

It follows that, under the common law or the statutes of this state, George Schoettle, after having been arrested, was permitted to be outside of jail liberties and from under official custody. That seemed fatal to plaintiff's cause of action

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on the first hearing. The aspect would have been the reverse had it been understood that under the law of Michigan George Schoettle was within jail liberties till he departed from the county wherein he was arrested.

The vital point of the case does not appear to have been fully appreciated when the cause was first presented here. The statute of Michigan, which governs the matter, was not referred to by either side, in the briefs or oral arguments. The record of the trial did not clearly disclose introduction of the statute. Looking through that part of the bill of exceptions where one would expect to find evidence of its introduction, it is not clearly there. It appears, *in extenso,* with a copy of all statutes introduced at the end of the bill. Counsel now seem to agree that it was introduced in evidence. The main contention of counsel for defendants is that it was not competent because not pleaded. It is considered that there is no merit in that. It was mere matter of evidence to prove a fact essential to the cause of action. The fact was pleaded. Of course, it was not necessary to plead the evidence to prove the fact.

Why the Michigan statute which now seems so vital and would certainly have seemed so before had it been brought to our attention, was not mentioned in the briefs and made prominent on the argument, is not perceived. Under the circumstances, particularly the state of the record, it seems quite natural that it escaped our attention.

Sec. 8912, How. Ann. Stats. Mich. 1882, fixes the jail limits in that state at the boundaries of the county within which the jail is situated and provides that a person under arrest, as in this case, shall be entitled to the liberties of the jail limits of such county, upon executing a bond to the sheriff, as indicated; and sec. 8919 of such statutes provides that

"The going at large of any prisoner who shall have executed such bond, or of any prisoner who would be entitled to the

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liberties of any jail upon executing such bond, within the jail limits of the county in which he shall be in custody, shall not be deemed an escape of such prisoner, but in case any such prisoner shall go at large without the jail limits of such county, without the assent of the party at whose suit such prisoner shall be in custody, the same shall be deemed an escape and forfeiture of the bond so executed, and the sheriff in whose custody such prisoner shall have been, shall have the same authority to pursue and retake such prisoner, as if such escape had been made from the jail."

The effect of the foregoing is unmistakable. It, in legal effect, extended the prison bounds so as to make them coincide with the bounds of the county within which it is situated. So long as a prisoner remains within the county he is in the legal custody of the sheriff, the same as if confined to the bounds of the jail under the rules of the common law. For one so circumstanced to leave the county without the assent of the person at whose suit he is under arrest, is just as much a wrong as if he broke and escaped from jail limits as that term was used in ancient law.

It follows that, when George Schoettle broke his parole, so to speak, by departing from his county, he committed a wrong to the damage of the plaintiff, *Gebhardt*. The damage drew to the cause of action for the wrong all persons who participated in its commission. That element, the combination to induce and aid the prisoner to escape from the officer's constructive custody and the execution of the purpose of the combine, under the rules referred to in the former opinion, made a good cause of action in *Gebhardt's* favor against the co-conspirator for damages.

Thus the law of the case, as before decided, is so varied by the statutes of the state of Michigan, where the cause of action arose, that the judgment against *Eugene Schoettle* is right and must be affirmed; that the judgment as to defendant *Holmes* must be reversed, and the cause remanded with direc-

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tions to amend the judgment in plaintiff's favor so as to be against both defendants.

By the Court.—So ordered. Costs in this court to go in plaintiff's favor on both appeals.

All Justices concurred.

LOOSEN, Respondent, vs. SCHISSLER, imp., Appellant.

April 6—April 23, 1912.

Partnership: Loan brokers: Notice to partners of firm transactions: Mortgages: Recording: Priority: Settlement: What included.

1. Notice to one partner concerning partnership transactions is notice to the copartners.
2. Thus, where a firm of loan brokers lent money for a client, taking a mortgage to him as security, each partner had at least constructive notice of such mortgage, and it is prior as a lien to a mortgage afterwards taken by one of the partners in his own name on the same land and recorded before the mortgage to the client.
3. The fact that the client's mortgage was prior to that of the partner did not make such partner in any way a debtor of the client so that the client's mortgage would be transferred or in any way affected by an instrument of settlement by the terms of which the client sold and transferred to such partner and another member of the firm all debts due or to become due to him from the firm or either of said partners, together with all accounts, notes, actions, claims, demands, etc., whatsoever against said partners or either of them.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

The appeal is by the defendant *J. J. Schissler* from a judgment of foreclosure and sale adjudging plaintiff's mortgage to be prior to appellant's mortgages. The appellant, his brother, and one Spurny were copartners in the real estate and loan

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business under the firm name and style of Schissler Bros. & Spurny in the city of Milwaukee during all the times mentioned herein. On March 19, 1904, the plaintiff furnished the firm, through Spurny, $300 to loan on real-estate security. The firm loaned the money to one Shebel, took a note and mortgage from him securing the same on the property in question, and turned the securities over to plaintiff. At that time the title to the property, to the knowledge of the members of the firm, was in fact in Spurny, but not of record. Spurny advised plaintiff not to record his mortgage, and the latter followed such advice and did not record it until January 18, 1909. Interest on the loan was paid through the firm until 1908. In that year the appellant discovered that Spurny was short in his accounts and greatly indebted to the firm. To protect himself on account of such indebtedness he took a note from Spurny for $2,900 in August, 1908, secured by a mortgage on the property covered by plaintiff's mortgage, and in December of the same year took another note for $1,800 secured by a mortgage on the same premises. Both of appellant's mortgages were recorded prior to plaintiff's mortgage. Subsequent to the Shebel loan, and on July 24, 1904, plaintiff turned over to the firm of Schissler Bros. & Spurny the sum of $800, and on June 12, 1907, the further sum of $1,200 to be loaned on real-estate securities. No loans were made for such sums, and in January, 1909, plaintiff had a settlement with the Schisslers, evidenced by an instrument as follows:

"Know all men by these presents that we, *John Loosen* and Rosa Loosen, his wife, of the city of Milwaukee, in the county of Milwaukee and state of Wisconsin, for good and valuable considerations to us paid by *J. Joseph Schissler* and Prok V. Schissler of the same place, the receipt whereof is hereby acknowledged, do and each of us does hereby sell, assign, transfer and set over to said *J. Joseph Schissler* and Prok V. Schissler all and whatever debt or debts, sum or sums of money now due us or either of us and becoming due to us or either of us from Victor M. Spurny of Milwaukee, or from *J. Joseph Schissler* or Prok V. Schissler, of Milwaukee, Wis-

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consin, or from the late firm of Schissler Bros. & Spurny, or from either, any or all of them, together with all accounts, notes, receipts, contracts, actions, proceedings, claims and demands whatsoever in law or equity which against the said Victor M. Spurny, *J. Joseph Schissler* and Prok V. Schissler, or either of them, we or either of us ever had, now have or has, or which our or either of our heirs, executors, administrators, or any of them, hereafter can, shall or may have, for or by reason of any cause, matter or thing whatsoever, and particularly sell, assign and transfer to the said *J. Joseph Schissler* and Prok V. Schissler our and each of our claim or claims, demands and actions arising and growing out of the transactions evidenced by the following receipts, to wit: a receipt for $1,200 dated June 12, 1907; a receipt for $800 dated July 22, 1904. And we do and each of us does hereby further sell, assign and transfer to said *J. Joseph Schissler* and Prok V. Schissler all and each of our claims, demands and actions arising or growing out of interest money collected by Schissler Bros. & Spurny and delivered to Victor M. Spurny for payment to us or either of us. To have and to hold all of the foregoing to the said *J. Joseph Schissler* and Prok V. Schissler, with power to collect and enforce the same at their own cost, expense or charge.

"Witness our hands and seals this 28th day of January, 1909.

(Signed) "JOHN LOOSEN.
"ROSA LOOSEN."

The trial court held that the Schissler mortgage was not included in the settlement of January, 1909, and that appellant's mortgages were subject to the lien of plaintiff's mortgage. From a judgment entered accordingly the defendant *J. J. Schissler* appealed.

For the appellant there was a brief by *Lenicheck, Robinson, Fairchild & Boesel,* and oral argument by *E. T. Fairchild.*

For the respondent there was a brief by *Houghton, Neelen & Houghton,* and oral argument by *F. W. Houghton.*

VINJE, J. Some claim is made that the Schisslers and Spurny were not partners. But the evidence is conclusive

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that for years they held themselves out, and acted, as such, and it is admitted that as to third persons they were partners; which is sufficient for the purposes of this case, as there is no evidence to show that plaintiff did not deal with them as partners, or that he had any knowledge that they were not such. But the evidence shows that they were in fact partners. Being such, notice to one partner concerning partnership transactions is notice to the copartners. *Hubbard v. Galusha,* 23 Wis. 398; *Tucker v. Cole,* 54 Wis. 539, 11 N. W. 703; 30 Cyc. 531; 1 Bates, Partn. § 389. So the appellant is charged with constructive notice of the Shebel mortgage even if he did not have actual notice thereof. The trial court found that he knew the title to the Shebel property was in Spurny at the time the loan was made, and there is good ground to believe he had actual knowledge of the Shebel loan and mortgage. However, be that as it may, he had constructive notice thereof, and therefore when he took the mortgage from Spurny to secure his indebtedness to the firm he knew that plaintiff had a prior mortgage on the same premises and that his mortgages were subordinate thereto.

It is claimed the Shebel mortgage passed by the assignment executed in January, 1909. Just how it passed is not made clear. The Shebel mortgage was no charge against the appellant and no claim was made by plaintiff that it was. The fact that plaintiff held a mortgage on the same premises covered by appellant's mortgages, and that his was prior to those of appellant, did not operate to make the latter a debtor of the plaintiff or sustain any personal liability whatever towards him. Nor was the Shebel mortgage either directly or by implication mentioned or referred to in the assignment, so we must conclude the trial court correctly held it was not included therein or in the settlement then made.

By the Court.—Judgment affirmed.

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KIEFER-HAESSLER HARDWARE COMPANY, Appellant, vs. PAULUS, Administrator, and another, Respondents.

April 6—April 23, 1912.

Chattel mortgage or lease? Writing construed: Tender: New trial: Newly discovered evidence.

1. A written instrument, though containing formal words appropriate to a lease, is *held*, on the evidence, to have been a chattel mortgage or security for the payment of the purchase price of the articles described therein, rather than a lease.
2. When tender of the whole amount due under a chattel mortgage securing the purchase price of the articles described therein is made and kept good, the title passes to the purchaser.
3. A motion for a new trial on the ground of newly discovered evidence was properly denied where, if there had been proper diligence, such evidence would have been discovered and produced at the trial.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an action of replevin to recover possession of a hotel range and certain other articles comprising a part of the outfit for a restaurant. It was undisputed that the property originally belonged to the plaintiff (which is a corporation engaged in the hardware business at Milwaukee), and that in February, 1910, it was delivered to one Kuchiaras, a restaurant keeper (since deceased), under the following written agreement:

"*This Certifies,* That I, G. Kuchiaras, residing at No. 189 3rd Street, in the City of Milwaukee, State of Wisconsin, have rented and received from *Kiefer-Haessler Hdw. Co.* of Milwaukee, Wisconsin, (1) One Hotel Range, (1) One Water Cooler, (3) Three Urns, (1) One Cake Griddle, (1) One Hot Plate, (1) One Tray under Urns, all complete and in good order and valued at Two Hundred Sixty-five Dollars ($265) which I agree to *use with care* and keep in like order, and for the use of which I agree to pay to the order of *Kiefer-Haessler Hdw. Co.* rent as follows: The sum of One Hundred

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Dollars ($100) upon delivery of this agreement as a guarantee of the faithful performances upon my part of all the conditions thereof, and the further sum of Twenty-five Dollars ($25) rent on or before the 15th day of each month hereafter for six months at the office of *Kiefer-Haessler Hdw. Co.* without notice or demand. But if default shall be made in either of said payments, or if I shall sell, or offer to sell, remove, or attempt to remove the said furniture from my place of residence above mentioned without the written consent of said lessor, then and in that case, or at the expiration of the time for which said furniture is rented I will return and deliver the same to the said lessor in good order, save reasonable wear, and the said lessor or his agents may resume actual possession thereof; and I hereby authorize and empower the said lessor, or his agents, to enter the premises wherever said furniture may be, and take and carry the same away, hereby waiving any action for trespass or damages therefor and disclaiming any right or resistance thereto; and also waive all right of homestead and other exemptions, under laws of the state of Wisconsin, as against this obligation.

"It is also further agreed, that I may at any time within said rental term, purchase said furniture and apparatus, by paying therefor the full valuation above stated and then and in that case only, the rent and guarantee theretofore paid shall be deducted therefrom.

"Witness my hand and seal this 8th day of February, 1910."

The agreement was signed by Kuchiaras and by the respondent *Coils,* but there was a conflict in the evidence as to whether *Coils* signed as a witness or as a party. Kuchiaras paid the $100 named in the agreement February 8, 1910, but did not pay the monthly instalments falling due on March 15th and April 15th. Thereupon this action of replevin was brought against both Kuchiaras and *Coils.* *Coils* filed a general denial, and Kuchiaras made answer admitting the execution of the agreement, pleading a tender of $165 (the entire balance due on the contract) on April 13, 1910, and interposing two counterclaims, one for damages for the wrongful removal of the articles on the writ, and the second for dam-

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ages for delay in delivering the articles at the time of the original sale.

The court at the close of the testimony directed a verdict in favor of the defendant *Coils,* nonsuited the plaintiff as to Kuchiaras, and submitted the question of damages on the counterclaims of Kuchiaras to the jury by special verdict. The jury returned a verdict finding $200 damages upon the first counterclaim and $100 upon the second. The plaintiff made the usual motions for judgment *non obstante,* for change of the answers of the verdict, for setting aside of the verdict and new trial, and finally for new trial on newly discovered evidence, all of which were overruled, and judgment entered dismissing the complaint as to *Coils* and awarding the property to Kuchiaras, and adjudging that he recover of the plaintiff the damages found by the jury upon the counterclaims. From this judgment the plaintiff appealed.

Pending the appeal Kuchiaras died, and the respondent *Christoph Paulus,* being appointed administrator of his estate, was substituted as a party.

For the appellant there was a brief by *Carroll & Carroll,* and oral argument by *G. J. Carroll.*

Edward H. Hibbard, for the respondents.

WINSLOW, C. J. It seems that the court was entirely right in dismissing the action as to the defendant *Coils.* Without stating the evidence in detail, we think it clearly appeared that Kuchiaras was in fact the sole party interested, and that the action should have been brought against him alone. The court was also right in construing the contract in question as a chattel mortgage or security for the payment of the purchase price of the articles rather than as a lease. Under the circumstances shown by the evidence the intention of the parties is so plain, notwithstanding the formal words appropriate to a lease, that no other construction is permissible.

The proof that a tender of $165 or more was made on be-

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half of Kuchiaras April 13th and renewed on April 14th was absolutely undisputed upon the trial, and the tender was kept good by the deposit of the money in court. Such being the case, the trial court could pursue but one course, namely, nonsuit the plaintiff. When the tender was made and kept good, the title to the property passed to the defendant. The newly discovered evidence which formed the basis of the motion for a new trial consisted of a letter written by the attorney of the defendant Kuchiaras to plaintiff's firm on April 14, 1910, in which there are expressions which indicate that the tender made on the previous day was the sum of $175, and was intended to cover not only the contract price of the articles in question, but the balance due upon an open account which plaintiff claimed to be about $100. If this were found to be the fact, then there would have been no sufficient tender. The difficulty is that there is no sufficient excuse for not producing the letter upon the trial. It was not lost, but was in the plaintiff's letter files, and due preparation for trial would certainly suggest, if not require, careful search for letters on the subject, especially in view of the fact that the answer specifically pleaded the making of a tender and its exact date. It seems that the trial court was justified in denying the motion on the ground of lack of diligence in preparing for trial.

It is said that the evidence as to damages upon the counterclaims is insufficient, and too vague to sustain the findings of the jury. It is true that the evidence is not as satisfactory as could have been desired, but we are unable to say that there is not some evidence upon which the conclusions of the jury can stand.

Some minor exceptions are urged and have been carefully examined. They are not deemed to possess any substantial merit, nor are they of sufficient importance to warrant detailed treatment.

By the Court.—Judgment affirmed.

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FLYNN, Respondent, vs. MODERN STEEL STRUCTURAL COMPANY, Appellant.

February 26—May 14, 1912.

Master and servant: Injury: Negligence of master: Permitting customary use of unsafe methods forbidden by formal rules.

1. In an action by an employee in an establishment for manufacturing structural steel work, for injuries received while helping to move a heavy viaduct arch by reason of the slipping of the chain by which the arch was being lifted, a finding by the jury that the employer negligently allowed an unsafe and improper method of shortening the lifting chain to be used in its shop is *held* to be sustained by the evidence.
2. If in such a case the employer had knowingly permitted the customary use in the shop of a method of shortening the chain which it knew or ought to have known to be unsafe, it was guilty of negligence, even though it had promulgated formal orders to adopt some other method.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action for personal injuries. The defendant owned and operated a large establishment for the manufacture of structural steel work at Waukesha. The plaintiff, a young man twenty years of age, was employed as a helper about the shop, doing such work as he was directed to do, March 15, 1909. He had previously worked in various iron and bridge concerns for some months at a time during the greater part of the time for more than three years. He was seriously injured March 19, 1909, while engaged in assisting in the work of milling a heavy viaduct arch, by reason of the slipping of the chain by which the arch was being lifted. A number of grounds of negligence were alleged in the complaint, but on the trial all claims of negligence were eliminated save two, viz.: (1) failure to warn, and (2) allowing an unsafe method of shortening the lifting chain to be commonly used in the shop.

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The jury returned the following special verdict:

"(1) Did the defendant negligently fail to furnish plaintiff a reasonably safe place to work? *A.* No.

"(2) Did the defendant negligently fail to sufficiently warn and instruct the plaintiff as to the dangers incident to his employment? *A.* Yes.

"(3) Did the defendant negligently allow an unsafe and improper method of chain shortening to be used in its shop? *A.* Yes.

"(4) Did the defendant negligently fail to furnish a reasonably safe chain for hoisting the spider that injured the plaintiff? *A.* No.

"(5) If you answer 'Yes' to the first, second, third, and fourth questions, or to any of them, then was the negligence of the defendant with respect to any or all of the matters specified in the first, second, third, and fourth questions and the affirmative answer or answers thereto, or to any thereof, the proximate cause of plaintiff's injuries? *A.* Yes.

"(6) If you answer 'Yes' to the fifth question, then state particularly the matter or matters which constituted such proximate cause.

"(a) The matter specified in the first question and in the affirmative answer thereto. ——.

"(b) The matter specified in the second question and in the affirmative answer thereto. Yes.

"(c) The matter specified in the third question and in the affirmative answer thereto. Yes.

"(d) The matter specified in the fourth question and in the affirmative answer thereto. ——.

"(7) Was the plaintiff guilty of any want of ordinary care on his part which proximately contributed to cause his injuries? *A.* No.

"(8) Was the injury to the plaintiff caused wholly by negligence on the part of Robert L. Roberts, the operator of the rotary planer? *A.* No.

"(9) What sum of money will compensate the plaintiff for the damages sustained in consequence of the injury suffered by him? *A.* $7,200."

The usual motions by defendant to change the answers to the vital questions of the special verdict and for judgment

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thereon, or, in the alternative, for a new trial, were made and denied, and judgment was rendered for the plaintiff on the verdict, from which judgment this appeal is taken.

For the appellant there were briefs signed by *Harper & McMynn,* and oral argument by *R. N. McMynn.*

For the respondent there were briefs by *Glicksman, Gold & Corrigan,* and oral argument by *W. D. Corrigan.*

The following opinions were filed March 12, 1912:

WINSLOW, C. J. The only serious question presented on this appeal is whether there was sufficient evidence to justify the jury in finding that the defendant negligently allowed an unsafe and improper method of shortening the lifting chain to be used in its shop. This question must be answered in the affirmative.

The circumstances of the accident were in brief these: The workmen were engaged in completing a very heavy iron or steel arch, which was one of thirteen to be used in viaduct construction, and in course of the work it was necessary to lift the arch by means of a large electric traveling crane and carry it to a certain planing or milling machine in order to plane off certain parts thereof. The planer was located under a gallery in the shop, and for this reason it became necessary to shorten the chain used in lifting the arch. The chain was fitted with a grab link at one end for the purpose of shortening it quickly. This grab link was a very large, long link, with a long aperture large at the upper end and tapering to a small narrow slit at the lower end, the idea being that the chain could be at once shortened by bringing the body of the chain up through the link, in which position it would be securely gripped by the narrow part of the aperture in the grab link, if the part of the chain so passed through the grab link was carefully put below the link which was permanently attached to the grab link, so that the part passed through would be at the bottom of the narrow end of the grab link. If, however,

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the chain were simply passed through the grab link, leaving the link which was permanently attached to it at the bottom of the narrow end, there would be danger of the chain slipping by reason of the fact that it would not be at the bottom of the link, but near the middle where the aperture begins to enlarge. There was testimony tending to show that the latter, or unsafe, method of shortening the chain was used in lifting the arch at the time of the accident, and it is undisputed that as the arch was lifted after the chain was shortened the chain slipped and the arch sagged suddenly downward, and caught the plaintiff under one edge as he was engaged in performing his duty of steadying the arch during the process.

We have carefully examined the testimony to ascertain whether there was credible evidence tending to show that this latter, or unsafe, method of shortening the chain was frequently and customarily used in the shop with the master's knowledge, or for so long a time that the master's knowledge must be presumed, and find that there were several witnesses who worked for the defendant for various periods during the two or three years immediately prior to the injury when the grab-hook chain was in use, and who testified to seeing the unsafe method frequently used in the shop. These witnesses seem to be credible witnesses, at least there is nothing in the case which would justify the court in saying that they are not to be believed. So we come to the conclusion that there is sufficient foundation for the finding in question.

This conclusion really disposes of the case. If the defendant knowingly permitted a method of fastening the chain which it knew or ought to have known to be unsafe to be customarily used in the shop, it was undoubtedly guilty of negligence notwithstanding it may have promulgated formal orders to adopt some other method (5 Thomp. Comm. on Neg. § 5404; *Collins v. M. P. & N. R. Co.* 136 Wis. 421, 117 N. W. 1014), and if, as the jury found in the present case, the use of this method proximately caused injury to an employee

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in the exercise of ordinary care, the liability of the defendant is established.

The remaining rulings complained of by the appellant do not seem to require detailed treatment. They have been carefully examined and are not deemed to be in any material respect prejudicial, even if it should be held (which it is not) that any of them were erroneous or doubtful. The issues in the case were in our judgment fairly tried and submitted to the jury, and the judgment must be affirmed.

By the Court.—It is so ordered.

TIMLIN, J. I concur in this decision because it appears to me that the business carried on by employer and engaged in by employee was of that hazardous nature in which the law imposes upon an employer the duty to make and promulgate rules for conducting the operations of the shop. This duty is not performed by mere perfunctory publication of rules, but some care and diligence is required in seeing that such rules are put into practice and not habitually disregarded. I do not think the rule of this case should be extended to include less hazardous occupations, because it trenches so closely upon the fellow-servant rule. The liability incurred under this rule seems also to differ from that incurred by knowingly retaining in the service an incompetent employee, in that in the latter case all the acts of negligence must have been those of one fellow-servant, while here they may be a series of negligent acts or omissions indulged in by several otherwise competent fellow-servants with the knowledge, actual or presumed, of the employer.

A motion for a rehearing was denied May 14, 1912.

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DIETZ, Plaintiff in error, vs. THE STATE, Defendant in error.

March 16—May 14, 1912.

Criminal law: Evidence: Other offenses: Murder while resisting arrest: Intent: Previous acts and threats: Warrant: Instructions to jury: Omissions: Waiver: Change of venue: Prejudice: Calling in another judge: Right of accused to try his own case: Appointment of attorney.

1. As a general rule, it is not competent in a prosecution for one crime to introduce evidence of other offenses; but where such other offenses directly tend to prove some material element of the crime under investigation, such as guilty knowledge or some specific intent, they may be shown.
2. Upon a prosecution for the murder, by shooting, of a deputy sheriff who, in an attempt to arrest the defendant under criminal warrants, had with other deputies, armed with rifles, surrounded and laid siege to defendant's home in a clearing in the woods, it was competent for the state, in order to negative any claim that defendant acted in a good-faith defense of his home and family from attack by persons who appeared to be wrongdoers, and to establish that he had the criminal intent necessary to constitute murder, to show that he had frequently and uniformly during the preceding years made armed resistance to arrest and had threatened to shoot the officers on sight and that he would never be taken alive.
3. The fact that some of the acts of resistance to arrest were remote in point of time did not, of itself, render such evidence incompetent, especially where such acts were repeated year after year down to a recent time and were all apparently inspired by the one purpose to resist the execution of legal process.
4. The evidence of defendant's previous acts and threats was admissible also to explain and justify the extraordinary display of force in the attempt to arrest him on the occasion in question.
5. Such evidence was not confined in its probative effect to the question of defendant's intent, but was admissible generally because it tended to prove a general design or system of which the shooting of the deputy on this occasion was simply an integral

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part necessary to the successful consummation of the design or system.

6. Evidence that a loaded set gun and large bear traps were found at places where officers were likely to approach defendant's house, was admissible as tending to show preparation or design to make forcible and deadly resistance to arrest.

7. A criminal warrant upon which the officers were endeavoring to arrest the defendant at the time of the shooting in question was properly received in evidence to justify their armed approach to defendant's home.

8. The rule that, in the absence of any request by the defendant, failure to charge the jury as to certain matters or omission to submit certain degrees of crime is not error, is not strictly applied in this case, defendant having tried his own case without the assistance of an attorney.

9. The calling in of a judge of an adjoining circuit to try a case in which an affidavit of prejudice has been filed against the presiding judge, is a change of venue within the meaning of sec. 4680, Stats. (1898), providing that not more than one change of venue shall be awarded in any cause.

10. The evidence in this case is *held* ample to sustain the verdict to the effect that the shot which killed the deputy sheriff was fired by the defendant.

11. Every person *sui juris* who is charged with crime has the right to try his own case if he so desires, and the court would not be justified in imposing counsel upon him against his will.

12. At the opening of a trial for murder, defendant stated that although he was able to employ an attorney and had had many applications for the position he preferred and intended to try the case without any attorney. There was nothing to indicate any lack of mental competency on his part, and in fact he managed his case with shrewdness and with knowledge and active assertion of his substantial rights, making due and timely objections to evidence and addressing the jury with fluency and force. He secured the acquittal of other members of his family who were tried with him, but was himself convicted upon ample evidence of his guilt. *Held*, that there was no error in failing to appoint an attorney to defend him.

ERROR to review a judgment of the circuit court for Sawyer county: A. H. REID, Judge. *Affirmed.*

John F. Dietz, his wife, Hattie, and his son, Leslie, were

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prosecuted for the murder of one Oscar Harp, and upon the trial of the case before the circuit court for Sawyer county in May, 1911, the wife and son were acquitted and *John F. Dietz* was convicted of murder in the first degree and sentenced to imprisonment for life. He prosecutes this writ of error to reverse that sentence.

It appears that in October, 1910, and for ten years or more previous to that time, *John F. Dietz* lived with his family upon a farm of 160 acres, owned by him upon a small stream called the Thornapple river in Sawyer county, and nine or ten miles from the railroad station called Winter. Most of the farm was cleared, but it was surrounded by heavy timber. The road from Winter opens into the clearing near the northwest corner thereof. The buildings on the farm are all log structures and consisted of a house, barn, and root house, the barn being the most northerly of the group and the house the most southerly. The barn is a two-story structure, the slopes of its roof being to the east and west, and the roof being covered with "shakes" instead of shingles. The river runs along the west side of the farm in a general northerly and southerly course. About 400 feet northerly from the barn there was a rise of ground referred to on the trial as the "lookout." About 500 feet easterly from the buildings were several piles of lumber with alleys between. In September, 1910, a criminal warrant was placed in the hands of Michael Madden, the sheriff of Sawyer county, commanding him to arrest *John F. Dietz* for assault with intent to murder one Bert Horrell on the 6th day of September, 1910. The sheriff had other warrants in his hands for the arrest of *Dietz* for other criminal offenses alleged to have been committed during previous years, and, after having formed a posse of more than twenty deputies, he approached the *Dietz* farm October 6, 1910, and surrounded it, the deputies being armed with rifles on account of previous occurrences referred to in the opinion. Attempts were made on October 6th and 7th to induce *Mr. Dietz* to submit to ar-

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rest, but they failed, and on October 8th a formal siege of the buildings was inaugurated and many shots were fired by the deputies at the buildings, and it is claimed that the fire was returned by *Dietz* himself and by members of his family. At about 11 o'clock in the forenoon Deputy Sheriff Thorbahn, who was in charge of the proceedings, directed a number of deputies (among whom was Oscar Harp), who were located some distance to the east of the lumber piles, to move forward across a cleared field to the shelter of the lumber piles. They obeyed and proceeded toward the lumber piles on their hands and knees. As they were so doing, three shots were heard and Harp was struck and killed by the first shot, while his companions reached the lumber piles. The claim of the state was that the shot in question was fired by *Dietz* from the upper story of the barn through what was called a porthole in the roof, made by removing one of the "shakes" of which the roof was composed. The claim of the defense was that this fact was not proven, and that it was entirely reasonable to suppose that one of the deputies stationed on the westerly side of the farm fired the shot. All of the defendants declined to be defended by counsel, and neither of them was sworn as a witness. The trial occupied about ten days.

Maurice McKenna, J. E. Malone, and *E. H. Naber,* for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, Russell Jackson,* deputy attorney general, *S. J. Williams,* district attorney, and *V. W. James,* of counsel, and oral argument by *Mr. Jackson* and *Mr. Williams.*

WINSLOW, C. J. The plaintiff in error (hereinafter called the defendant) claims error (1) in the admission of evidence, (2) in the instructions to the jury, and (3) in the denial of a new trial, and these claims will be discussed in the order named.

1. The evidence in the present case disclosed a most re-

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markable transaction,—one which would seem almost incredible in a state where law and order have been long established, were the evidence anything less than conclusive. A citizen of the state, a man of at least some property and substance, a man with a wife and family of children, apparently a man of intelligence and quick perception, sets at defiance the officers of the law, retreats to his home, wages actual war with the state, and only submits to arrest after a human life has been snuffed out as one might snuff a candle. There was, of course, some reason for this unusual display of force on the side of the officers of the law and for this armed resistance on the part of the defendant. Sheriffs do not ordinarily proceed to make arrests with a score or more of deputies armed with rifles, nor do citizens ordinarily make fortresses of their homes and do battle with the duly constituted authorities of the state. A man who sees his home surrounded by armed men stealing from tree to tree and shooting to kill has a right, doubtless, to defend himself and his family by like methods, unless he knows that the purpose of the approach is rightful, and that he has only to submit to arrest by the official conservator of law and order to be entirely safe from violence. Upon the trial of the present case the prosecuting attorneys doubtless realized the necessity of explaining and justifying the manner of the sheriff's approach, as well as the necessity of making it plain that defendant, in resisting arrest with firearms, was not acting in good-faith defense of his home and family from attack by persons who appeared to be wrongdoers, but rather in well understood defiance of the lawful execution of legal process. In order to accomplish this purpose a large mass of evidence was introduced by the state tending to show that on a number of occasions during the seven years immediately preceding the death of Harp the defendant had successfully resisted arrest on criminal warrants issued out of the state courts for various offenses, and had refused to permit service to be made upon him of injunctional

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orders and other civil process issued out of the federal court; that upon most of these occasions he had threatened to shoot the officers, had proclaimed that none of them should take him alive, and had used his rifle in driving them from his premises. One of the most aggravated instances of resistance to arrest so introduced in evidence was that of May 7, 1904, when Sheriff Giblin and his deputies, armed with a bench warrant and a criminal warrant against the defendant, were ambushed on the road by two disguised men with rifles, one of the men being identified as the defendant and the other as one Weisenbach, a neighbor. For this offense Weisenbach was prosecuted and convicted, and the conviction affirmed by this court. *Weisenbach v. State,* 138 Wis. 152, 119 N. W. 843. Reference to the report of that case will show the details of the resistance to arrest on that occasion. It is not deemed necessary to go into the details of the various attempts to arrest the defendant which were related to the jury. None of them were successful. The officers of the law became thoroughly intimidated, and the unexecuted warrants remained in the hands of the various sheriffs, and were passed along as sheriff succeeded sheriff, becoming seemingly a part of the usual muniments of title to the office. Sheriff Madden received them on his accession to office, and they were still unserved when he received the warrant for the alleged assault upon Horrell in September, 1910.

The proof of these previous acts of resistance to the efforts of officers of the law to arrest the defendant was supplemented by proof that on the occasion in question, before the actual siege of the buildings was begun, Deputy Sheriff Thorbahn, who was in charge of the posse, sent a letter to the defendant, advising him to surrender, that resistance was useless, and that he would be treated right. It was further shown that upon the rejection of this warning, Mr. F. L. Gilbert, then attorney general of the state, accompanied by Col. O. G. Munson, private secretary to the then governor, Hon. J. O. David-

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son, went to the defendant's house and had two long conferences with him and his wife, one on the 6th and one on the 7th day of October, in which conferences the defendant was urged to surrender himself, and was guaranteed a fair trial in a county and with counsel of his own selection. This guarantee was in writing, signed by the governor, and was left with him. In these conferences he was told of the whole situation, and that the officers had the entire place fully surrounded and would certainly take him by force. The attorney general in the last conference went so far as to propose that the criminal charges against all other members of his family, of which there were several pending, would be dismissed if he would surrender himself up. This offer was declined by the defendant, and he declined to consider the idea of surrender even in case all other criminal charges made against him were dismissed except the Horrell assault charge. No hostilities were begun until the day following the rejection of Mr. Gilbert's offers.

It is very evident that the evidence of the frequent and uniform armed resistance to arrest on the part of the defendant through the years preceding the occurrence in question, together with the evidence showing the unsuccessful attempts to persuade the defendant to peaceably submit on the 6th and 7th of October, go a very long way to explain the extraordinary occurrences of October 8th, and throw much light upon the mental attitude of the defendant at that time. Due and seasonable objections were made by the defendant to the evidence of the previous acts of resistance to arrest on the general ground that it is not competent in a prosecution for one crime to introduce evidence of other offenses. This rule is so well established that citation of authorities in its support is unnecessary, but certain exceptions to it are equally well established, namely, that where such other offenses directly tend to prove some material element of the crime under investigation, such as guilty knowledge or some specific intent, they

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may be introduced in evidence. *Fossdahl v. State,* 89 Wis. 482, 62 N. W. 185; *Paulson v. State,* 118 Wis. 89, 94 N. W. 771.

In the present case premeditated design to effect wrongful death was essential to a conviction. In its absence there could not be murder in the first degree. If the occurrences of October 6th, 7th, and 8th had been placed before the jury without explanation, it might perhaps still be claimed that the defendant had no certain knowledge that the mission of the men who stealthily approached his house armed to the teeth was lawful. Indeed, it very clearly appears from the cross-examination of Mr. Gilbert by the defendant, as well as from many remarks made by the defendant during the trial, that he took the position on the trial that he was justified in believing that Mr. Gilbert was not the person or official he represented himself to be, but was attempting to deceive him, and that he (*Dietz*) was justified in believing that the men who surrounded his house were not officers, but agents of a lumber company which he thought was endeavoring to obtain his property and ruin him financially. So seriously was this contention made by the defendant that the trial judge carefully submitted to the jury the question whether the shooting was done in lawful defense of the defendant's dwelling house. We think it clear that it was competent to negative this possible innocent intent or condition of mind on the part of the defendant, and establish the fact that he had the criminal intent which must be present in order to constitute murder, by the evidence of his previous acts of resistance to officers, and his threats that he would shoot them on sight, and that he would never be taken alive.

The principle on which such evidence is received to show intent or state of mind is simply the principle which the human mind instinctively applies in ordinary affairs of life. If the question be whether a given act was accidental or intentional, the fact that the actor has at numerous times performed similar acts under circumstances forbidding the idea

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of accident is very strong proof that the act under investigation was also intentional.

Mr. Wigmore in his work on Evidence (vol. 1, § 302) thus very clearly states the idea:

"In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defense, or good faith, or other innocent mental state, and tends to establish (provisionally at least, though not certainly) the presence of the normal, *i. e.* criminal, intent accompanying such an act."

It is true that some of the acts of resistance to arrest in the present case were remote in point of time from the act under investigation, but that does not of itself render such evidence incompetent, especially where, as here, the acts were repeated year after year down to a comparatively recent period, and were all apparently inspired by one purpose, namely, the purpose to resist the execution of legal process.

The principle was in substance recognized and applied by this court in *Boyle v. State,* 61 Wis. 440, 21 N. W. 289, and is amply supported by authority in other jurisdictions. 1 Wigmore, Ev. §§ 302, 363, 364, and cases cited in notes; *Comm. v. Holmes,* 157 Mass. 233, 32 N. E. 6; *O'Boyle v. Comm.* 100 Va. 785, 40 S. E. 121; *People v. Jones,* 99 N. Y. 667; *Sayres v. Comm.* 88 Pa. St. 291; *Koerner v. State,* 98 Ind. 7; *State v. Lapage,* 57 N. H. 245; Underhill, Crim. Ev. (2d ed.) § 90.

The general principle is thus tersely stated in *State v. Lapage,* 57 N. H. 245, at page 288:

"Any act of the prisoner may be put in evidence against him, provided it has any logical and legal tendency to prove any matter which is in issue between him and the state, notwithstanding it might have an indirect bearing, which in strictness it ought not to have, upon some other matter in issue."

Now, in the present case, after the killing of Harp was

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proven without dispute, there were two principal issues between the defendant and the state, namely, (1) whether the defendant fired the shot which killed Harp, and (2) if so, whether the shot was fired with the necessary premeditated criminal design to kill. If it were to be admitted that upon the first issue the evidence of the previous acts of resistance had no legitimate bearing, still upon the second issue it was certainly very persuasive in repelling the idea that the shot was fired in lawful self-defense. If the defendant had on numerous occasions in the past, with firearms and threats of violence, resisted officers who he was fully informed were seeking only to arrest him upon legal warrants, the inference would be strong against his contention that on the occasion in question here he was justified in supposing, or did suppose, that the men approaching his home were wrongdoers whom he could lawfully resist to the point of shooting, if necessary. It appears from the record that the trial judge was careful to state the grounds on which the evidence was admitted. He distinctly stated, when objection was made to this kind of evidence, that it was admissible simply to show the defendant's *attitude* towards the officers. He repeatedly declined to allow the evidence of the previous occurrences to proceed unless it was first clearly proven that an arrest under legal process was being attempted, and that the defendant was informed of the fact, and said in substance several times that only resistance to arrest could be shown.

But while we think the evidence in question was clearly admissible to show criminal intent, we are quite well convinced that this is not the sole ground of admissibility. The officers of the law were attempting to make the arrest of the defendant at the time in question in a most extraordinary manner. The tale sounds like an extract from the annals of a Mexican revolution. Instead of proceeding quietly, with perhaps a single deputy, to the defendant's residence, and taking him into custody without disturbance, the sheriff levied a veritable army of deputies, armed them with rifles, surrounded the

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house as though it were a hostile fortress, and conducted a regular siege or battle before accomplishing his purpose. No peace officer would be justified in making any such display of force under any ordinary circumstances. The question whether there was any necessity for such action would inevitably appeal strongly to any jury. If there was no necessity, the proceeding was not only indefensible, but positively shameful and lawless. The jury, it would seem, had a right to know what circumstances justified it, and they could only know that by knowing the previous difficulties between the defendant and the officers. While this bears directly on defendant's intent, its bearing is not confined to that alone,—it is necessary in order that the jury may have a complete picture of the situation, a picture to which the jury was entitled before rendering their verdict.

Further, so far as the defendant *Dietz* himself is concerned, there is another aspect of this testimony which has great significance: the evidence tends to show that on several of the previous occasions when the defendant resisted arrest he accompanied his resistance with threats of violence or death to any one attempting to arrest or serve process upon him, and statements that no such person would ever get him. These threats appear to have been made so generally and frequently that the jury would have been entirely justified in concluding that they were not confined to the particular attempted arrest on the occasion when they were uttered, but covered any such attempt which might be at any time made. They seem to indicate a fixed determination to shoot, if necessary, any officer of the law rather than allow such officer to arrest or serve process upon him.

If they are fairly capable of this construction, then it seems that the evidence of resistance to arrest upon former occasions tended unmistakably to show that the defendant had a general plan or design in mind which included the act for which he was being tried, namely, the general plan never to submit

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to arrest. Under this view of this evidence it was not confined in its probative effect to the question of the defendant's intent, but was admissible generally because it tended to prove a general design or system, of which the shooting of Harp was simply an integral part necessary to the successful consummation of the design or system. 1 Wigmore, Ev. § 304.

This seems to be a complete answer to the claim that fatal error was committed because the trial judge did not in his charge caution the jury that the evidence of the previous conflicts between the defendant and the officers was only to be considered upon the question of the defendant's intent. In strictness this contention might be answered by the simple statement that no such instruction was requested. *Birmingham v. State,* 145 Wis. 90, 129 N. W. 670; *Beauregard v. State,* 146 Wis. 280, 131 N. W. 347. Inasmuch, however, as the defendant in the present case declined to have the assistance of an attorney and tried his own case, we have not wished to apply any strict rule of practice, especially in view of the fact that it has been held by some courts that, where evidence is only admissible to prove intent, it will be prejudicial error not to confine its effect to that single purpose in the instructions to the jury. *Comm. v. Shepard,* 1 Allen, 575.

Error is alleged because the state was allowed to prove that a loaded set gun was found on the side of the lumber piles with the trigger attached to a copper wire running along the whole length of the lumber piles, so that any one passing between the piles towards the house was liable to run against the wire, pull the trigger, and receive the contents of the gun. Error is also alleged in the admission of evidence showing that three large bear traps were found set just in the edge of the woods on the outskirts of the *Dietz* farm, where the officers were likely to make their entry. There was no error in the admission of the evidence of either of these facts. Both of them tended to show preparation or design to make forcible

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and deadly resistance to arrest by the officers of the law. This class of evidence is quite universally recognized as admissible for very persuasive reasons. 1 Wigmore, Ev. § 238.

It is said that the court allowed the complaint in the criminal case of the state against *Dietz* for assault with intent to kill upon Bert Horrell, September 6, 1910, to be read to the jury, and this is alleged to be error. As matter of fact, it appears from the record that no such ruling was made. The warrant which was issued upon the complaint was received in evidence and read to the jury upon the examination of Sheriff Madden, because the sheriff was endeavoring to arrest the defendant under this warrant at the time of the shooting of Harp, and hence it was necessary to be shown in order to justify the armed approach to the *Dietz* homestead.

2. It is argued that the trial judge committed error in not charging the jury that there might be a conviction for murder in the second degree, or some of the lesser degrees of manslaughter, instead of submitting only the question of murder in the first degree. Here, again, it would be sufficient perhaps to say that no instructions submitting the lesser degrees of crime were requested, but we prefer to place our ruling upon the broader ground that under the evidence there was no room for any intermediate finding. The defendant was either guilty of murder in the first degree or he was innocent.

Objection is made to certain instructions on the ground that they contained erroneous statements of facts not in evidence. We have carefully examined the instructions so objected to and find no basis for the charge. The trial judge seems to have been very careful to make accurate statements whenever he had occasion to refer to matters of fact in his charge. As a whole the charge seems to us a clear, accurate, and fair statement of the legal principles which were applicable to the evidence in the case. The effort of the trial judge to clearly state to the jury every legal proposition favorable to the defendant, or which could properly be said to be neces-

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sary and proper for the jury to know in considering the question of his guilt, is very apparent.

A minor contention is made which will be briefly noticed here, although it does not relate to the charge of the court. Upon affidavits alleging prejudice of the circuit judge of Sawyer county, the Hon. ALEX. H. REID, circuit judge of the Sixteenth judicial circuit, was called in to preside at the trial. Thereupon an application was made by the defendants for a change of the place of trial, based upon a number of affidavits tending to show prejudice on the part of the people of Sawyer county. Although no affidavits were filed in opposition, the application was denied, and properly so. It is settled that the calling in of the judge of an adjoining circuit to try a case in which an affidavit of prejudice has been filed against the presiding judge is a change of venue within the meaning of the statute. *Perrin v. State,* 81 Wis. 135, 50 N. W. 516. There can be but one change of venue in a criminal action. Sec. 4680, Stats. (1898); *Baker v. State,* 88 Wis. 140, 59 N. W. 570; *Perrin v. State, supra.* As matter of fact, the record shows that a jury was easily obtained, and that the state used but two of its peremptory challenges and the defendants but three, and that the defendants waived any further strikes after full explanation and understanding of their rights.

3. The final contention is that a new trial should have been granted, because justice has not been done.

Most of counsel's oral argument was directed to this proposition, and to its consideration we have devoted the most time. The typewritten record of the trial covers nearly 1,200 pages, and to examine that record thoroughly is no light task. However, the defendant is entitled to the deliberate opinion and judgment of this court upon the question whether justice has been done, and hence we have felt it to be our duty to examine the record carefully and thoroughly. After that examination we feel compelled to say that it seems to us that the evidence

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was amply sufficient to warrant the verdict. The evidence of a long settled determination on the part of the defendant not to submit to arrest by the officers of the law was plenary and overwhelming. In addition to this, the evidence that he knew perfectly well the mission of the sheriff and his deputies on the occasion in question was conclusive. He had turned his house and barn into strongholds, provided himself with guns and ammunition in abundance, and deliberately refused to submit to the process of the law. The fact that Harp was killed while approaching the defendant's house by a rifle bullet which came from the direction of defendant's barn, and that the bullet was of a caliber corresponding to one of defendant's guns, is proven without serious dispute. In addition to this, witnesses testified to seeing the flash as the shot was fired coming from the so-called porthole in the roof of the defendant's barn, and further testified that they saw defendant go to the barn from the house with what looked like a gun in his hand a short time before the shooting of Harp. There was also testimony that the defendant was seen to return to the house from the barn with his gun about three hours later. It was also in evidence that empty shells of the same caliber as the bullet which killed Harp were found in the second story of the barn by the officers after the affair was over and the defendant had surrendered. In addition to all this, there was evidence which seemed to show that none of the sheriff's deputies were in position where they could have fired the shot so that it would apparently come from the direction of the barn. There were indeed some deputies on the other side of the farm at the distance of about a quarter of a mile from Harp, but the evidence seems to show that their positions were such that none of them could have reached Harp with a direct shot, on account of intervening obstacles. It was suggested that possibly a shot fired by one of them might have struck the barn and been deflected from its course and thus reached

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Harp. But when it is remembered that the bullet entered Harp's mouth, shattered the jaw bone, and went through the entire body, lodging finally against the thigh bone, it is quite evident that such an explanation of the shot is entirely unsatisfactory. The testimony tends to show that a bullet which had struck or passed through an obstacle and met with such resistance as to be substantially deflected from its course could not be likely to have force enough left to travel nearly 700 feet and pass entirely through the length of a man's body from mouth to thigh bone, and this testimony certainly accords with common sense.

The testimony seems to us to be ample to justify the conclusion of the jury that the bullet which killed Harp came from a rifle fired through a hole in the roof of the *Dietz* barn, and that such rifle was fired by the defendant; in fact we are unable to see how a jury could honestly come to any other conclusion. Few facts depending largely on circumstantial evidence are more satisfactorily proven than was the main fact in this case.

Another contention, however, merits and has received serious consideration, and that is the contention that the court should have appointed an attorney to defend the plaintiff in error, or at least to act as *amicus curiæ* and see that his rights were fully preserved.

It appears by the bill of exceptions that at the very opening of the trial, in response to inquiries by the trial judge, the defendants severally stated to the court that they preferred and intended to try the case without an attorney, and in addition thereto the plaintiff in error stated that he was able to employ an attorney if he desired, and that he had already had about 200 applicants for the position. It appears that the trial then proceeded to the end, a period of twelve days, with no attorney representing any of the defendants. It is now said that the plaintiff in error was an unlettered man, had no

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knowledge of the law, had never tried a case, and should not have been allowed to defend himself and his wife and son against a prosecution for the highest crime known to the law. Practically the claim is that the trial court was guilty of denying him a fair trial because it did not appoint an attorney to assume charge of the defense against the wishes of the defendants. It is worthy of note that as a result of this trial without counsel Mrs. Dietz and Leslie were at once acquitted. So far at least as they were concerned the most able counsel could have done no better. A critical examination of the record must also impress one with the fact that the plaintiff in error was by no means a stranger to courts or their proceedings. From the beginning to the end of the case it appears that he made objections to the admissibility of evidence offered, and to the form of questions, in language clearly showing an accurate perception of the reason for the objection, which in some instances could hardly have been improved by an accomplished lawyer. He made due and timely objection to all the testimony tending to prove previous resistance to officers. It will be interesting and illustrative to quote verbatim an objection and motion made by him concerning certain evidence of this nature, viz.:

"*John F. Dietz:* If the court please, they have offered all the evidence in this Harp murder charge that can be introduced in any of the other three cases pending against me in the courts of Sawyer county. It is incompetent evidence in this case, nothing to do with the Harp murder charge whatever. The fact for the court and for the witness to prove before this jury is whether the three defendants are guilty of killing Oscar Harp; it don't make any difference how many times we have resisted arrest or anything of the kind. It don't make any difference whether I resisted the officers of the law that day. The fact to prove before this court is that these three defendants did kill Oscar Harp or not. This other evidence is incompetent and I object to it and I move that all of it be stricken from the record."

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Without going further, it is sufficient to say that it appears that *Mr. Dietz* from beginning to end of the testimony was very active in the assertion of his real or supposed rights, and made objection in due season to practically all of the testimony the admissibility of which could be said to be in substantial doubt. So far as matters of real substance are concerned, it is not perceived how the most astute counsel could have materially aided him by way of objections to the admissibility of evidence. Nor is it by any means certain that a lawyer could have helped him at all in the argument of the case. *Mr. Dietz* addressed the jury in his own behalf evidently with fluency and force, for it appears that he was frequently interrupted by counsel for the state for the reason that he was traveling outside of the record. An argument of this nature by a man whose liberty is hanging in the balance may well appeal to an American jury with greater force than the argument of a skilful lawyer.

This, however, is not the question. We have referred to these matters simply to show that the defendants were not incompetents or innocents, who sat mutely in court and allowed the prosecuting attorneys to do as they chose, but rather that they managed their case with a shrewdness and knowledge of their substantial rights which was not only surprising but which may well have been fully as effective as if the defense had been conducted by an attorney.

Every person *sui juris,* who is charged with crime, has the right to try his own case if he so desires. The constitution guarantees him the right to be heard "by himself" as well as by counsel. Const. art. I, sec. 7.

The trial court would not have been justified in imposing counsel upon the defendant against his will, unless indeed it appeared that he was mentally incompetent, or not *sui juris* at the time of the trial.

We see nothing substantial to justify any such idea. Evi-

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dently the trial judge, whose ability, honesty, and earnest desire to safeguard the defendant's rights are not open to question, saw nothing indicating such mental incompetency or insanity. Had he seen that there was even a probability that such a condition existed, it would have been his duty at any stage of the trial to halt the proceedings and make an inquisition of the question. Sec. 4700, Stats. (1898); *Steward v. State,* 124 Wis. 623, 102 N. W. 1079.

The main ground upon which it is now urged that the defendant's incompetency appears is because of the fact that he declined to employ an attorney. The cogency of this fact as proof of incompetency may well admit of doubt. Certainly we cannot say, after examination of the record in this case, that he made any mistake in his decision. It does not seem at all within the range of possibilities that any attorney could have made the facts of this case which point towards the defendant's guilt appear any less convincing. Were it a case where the evidence was scanty and the conclusions doubtful, a different question might possibly be presented. As it is, we cannot feel that we are required or even authorized to interfere with the result. The defendant, after long and patient forbearance on the part of the officers of the law,—a forbearance which amounted really to weakness,—deliberately chose to take up arms and defy the state. Such things cannot be if social order is to be maintained among us. Our civilization is based on the fundamental idea that there must be just and uniform laws, administered by honest and fearless courts, and that every citizen must obey the process of such courts. If it be once admitted that any citizen may take the law in his own hands and resist the officers of the law with gun or sword, there is an end of government by law. Such a condition of things means anarchy and barbarism.

As a result of the defendant's defiance of law, Oscar Harp, who was innocent of wrong, went to his death without warn-

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ing. After a patient and fair trial the defendant has been found guilty of that death upon ample evidence. Pity the defendant as we may, we have no choice of courses on this record. It is as true now as it was in the days of the Hebrew prophet that he who sows the wind must needs be content if he be compelled to reap the inevitable whirlwind.

By the Court.—Judgment affirmed.

MURTHA, Respondent, vs. DONOHOO, Executor, Appellant.

April 6—May 14, 1912.

Limitation of actions: Pleading: Claims against decedent: Contracts: Validity: Consideration: Oral promise to pay for services by legacy: Breach: Measure of damages: Evidence.

1. With reference to a claim against the estate of a decedent the statute of limitations must always be considered although not pleaded.
2. An oral promise, accepted by the promisee, to compensate by a legacy services previously performed for the promisor by one not a member of his family, is based upon a sufficient consideration and is valid and binding.
3. Such an agreement is deemed a new and substitutionary contract, not within the purview of sec. 4243, Stats. (1898), and not affected by subsequent expiration of the time within which an action upon the original liability to pay for the services must have been brought had such liability continued.
4. Where the promise to compensate by a legacy is based upon a past or executed consideration, such as services previously performed and moneys paid out at the request of the promisor, the amount recoverable for a breach thereof is measured by the reasonable value of the services performed and the amount of the moneys so paid, with interest at the legal rate.
5. The amount agreed to be paid by legacy in such a case may be proved as having some evidential bearing on the reasonable value of the services where the disparity is not too great, but is not conclusive.

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APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

S. E. Smalley, for the appellant.

Maurice McKenna, for the respondent.

On behalf of *Josephine C. True,* a residuary legatee, there was a brief by *F. R. Bentley.*

The following opinion was filed January 30, 1912:

PER CURIAM. The special verdict in this case is as follows:

"(1) During the vacations of Lawrence J. Vaughan, the deceased, during the six years prior to his ordination as a priest in 1898, was he frequently at the home of *Catharine Murtha* in the city of Ripon, and was he there received as a member of the family, and did he receive, besides meals and lodging that he chose to take in their house, money from one or the other of them to help him, and also clothing purchased with the money of John Murtha, and did John Murtha pay for him a dentist's bill of about thirty dollars? *A.* Yes.

"(2) Did he promise to pay them for what they had done for him? *A.* Yes.

"(3) Did said Lawrence J. Vaughan, in the spring of 1901, at Ripon, say to John and *Catherine Murtha* in substance that for what they had done for him he would by his last will give to John Murtha the sum of a thousand dollars, and did John Murtha say to him at that time that that would be all right? *A.* Yes."

By sec. 3841, Stats. (1898), construed in *Martin v. Estate of Martin,* 108 Wis. 284, 84 N. W. 439, the statute of limitations need not be pleaded against such a claim. By sec. 4243, Id., no acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter (on limitations) unless the same be contained in some writing signed by the party to be charged thereby.

A reargument of this case is ordered upon the question

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whether the claim of the plaintiff as established by this verdict is barred by the statute of limitations.

The cause was reargued on April 6, 1912.

For the appellant there was a brief by *S. E. Smalley* and *F. R. Bentley,* and oral argument by *Mr. Bentley.*

For the respondent there was a brief by *Maurice McKenna,* attorney, and *Carter & Pedrick,* of counsel, and oral argument by *S. M. Pedrick.*

The following opinion was filed May 14, 1912:

TIMLIN, J. The respondent filed a claim against the estate of Lawrence J. Vaughan, deceased, for $1,000 upon contract hereinafter mentioned. Upon appeal to the circuit court judgment was given for respondent, and the executor appeals to this court, contending that the circuit court erred in not ascertaining and giving judgment for the reasonable value of the money paid and services performed instead of for the agreed sum of $1,000. The jury returned the special verdict set forth in the order for reargument, *ante,* p. 482, 134 N. W. 406. We find the verdict supported by evidence. Respondent had judgment upon the verdict. The statute of limitations in such cases must always be considered although not pleaded. Sec. 3841, Stats. (1898). Therefore the serious question arising is that upon which reargument was ordered: Does the verdict, by force of sec. 4243, Stats. (1898), disclose that the right of recovery is barred by lapse of time? We are not much aided by appellant's brief on reargument. He failed to cite *Thompson v. Orena,* 134 Cal. 26, 66 Pac. 24; *Chace v. Trafford,* 116 Mass. 529; *Bullard v. Lopez,* 7 N. Mex. 561, 37 Pac. 1103; *Reed v. Smith,* 1 Idaho (Prickett) 533; *Hill v. Perrin,* 21 S. C. 356; *Shapley v. Abbott,* 42 N. Y. 443; or *Stiles v. Laurel Fork O. & C. Co.* 47 W. Va. 838, 35 S. E. 986, or the cases referred to in these decisions,

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or any case throwing much light on his side of the controversy. It seems quite impossible to reconcile *Thompson v. Orena, supra,* with *Devine v. Murphy,* 168 Mass. 249, 46 N. E. 1066, cited by respondent, and we shall not attempt it. The question is new in this state and we are not bound by either precedent. It has however been decided by this court that an oral contract based upon a valid consideration to leave the promisee a legacy (personal property) is valid and enforceable. *Slater v. Estate of Cook,* 93 Wis. 104, 67 N. W. 15; *Jilson v. Gilbert,* 26 Wis. 637. It is also settled that services previously performed by one not a member of promisor's family constitute a good consideration for a promise to pay for such services. *Jilson v. Gilbert, supra; Silverthorn v. Wylie,* 96 Wis. 69, 71 N. W. 107. We have before us a case in which, after a similar right of action had accrued in favor of the respondent and the statute of limitations had begun to run against this right of action, an oral promise was made by decedent to compensate respondent by leaving him a legacy. To this the respondent assented. The first question which arises is whether or not such agreement is supported by a consideration. In *Fanning v. Murphy,* 126 Wis. 538, 105 N. W. 1056, the majority opinion is to the effect that a mere request for the extension of the due date of a debt at the contract rate of interest, and consent thereto, does not satisfy the essentials of a binding contract for an extension of time of payment. In *Jilson v. Gilbert,* 26 Wis. 637, it was held that a promise to reward, by a provision in the promisor's will, services previously rendered by the promisee, is valid. These two cases may stand together. They are not necessarily inconsistent. Where such agreement is made it insures to the promisor the personal use and enjoyment of his property during his life, and the promisee realizes on the promise only in case the promisor leaves estate unconsumed. This is surely a benefit or advantage flowing to the promisor and sufficient to support his promise to leave the legacy to his creditor. This, how-

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ever, is necessarily conditioned upon the agreement of the creditor to extend the time of payment until after the death of the debtor. The creditor, therefore, makes his promise to extend in consideration of a valid and binding promise to reward him by legacy. In a case in New York (*Patterson v. Patterson,* 13 Johns. 379) the creditor, after entering into such an agreement and before the death of the promisor, began suit on his original demand, but his right of action was held barred by such agreement. In support of the like rule see *Campbell v. Campbell,* 65 Barb. 639, and *Collier v. Rutledge,* 136 N. Y. 621, 32 N. E. 626, and the *Patterson Case* has been cited with approval in *Todd v. Weber,* 95 N. Y. 181; *Reynolds v. Robinson,* 64 N. Y. 589; and other New York cases noted in Silvernail's Citations. It may be that accurate analysis would disclose that there is no substantial difference between the contract in *Fanning v. Murphy, supra,* and *Jilson v. Gilbert, supra.* But if that be so, we refuse to extend the rule of *Fanning v. Murphy* to cases like this and *Jilson v. Gilbert.*

The agreement being valid and binding, what is the measure of damages for its breach—the value or amount of the original demand or the amount of legacy promised? In a case like the present, where the promise to compensate by legacy is based upon a past or executed consideration, the recovery must be limited to the amount of the demand so to be compensated, or the reasonable value thereof where the amount is not fixed and definite. This is ruled by *Merrick v. Giddings,* 1 Mackey (D. C.) 394, citing *Brown v. Crump,* 1 Marsh. 567; *Granger v. Collins,* 6 M. & W. 458; *Roscorla v. Thomas,* 3 Q. B. 234; *Bradford v. Roulston,* 8 Irish C. L. N. S. 468. See, also, 1 Parsons, Contracts (9th ed.) bottom pp. 508, 509, and cases; Wald's Pollock on Contracts (3d ed.) pp. 199, 200, and cases.

In the cases decided by this court, although the precise question is not involved, this principle seems to have been kept

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in mind. *Bayliss v. Estate of Pricture,* 24 Wis. 651, presented a situation where the consideration on the part of the promisee was to be performed and was thereafter performed, but the promise to compensate by will did not fix the amount of compensation, so that this question was not there involved. A recovery for the reasonable value of the services was accordingly permitted. *Jilson v. Gilbert, supra,* presented the case of an executed or past consideration, that is to say, services performed before the promise to compensate by will was made; and while it is ruled that the promise was not within the statute of frauds and was binding, the intimation is that the value of the services measures the amount of recovery. In the case there cited (*Snyder v. Castor,* 4 Yeates, 353) the promise was made after the services were rendered, no specific sum was promised, so this question did not arise. In *Patterson v. Patterson,* 13 Johns. 379, the promise was that the promisee should have the promisor's farm and that he intended to reward the promisee well, but the consideration was not past or executed. The court held that the promisee, having assented to this arrangement, could not maintain an action to recover compensation for these services during the lifetime of the promisor, his father, thereby construing the contract to amount to an agreement that the son should make no claim for compensation in his father's lifetime. Should the father fail to make the provision by will, the court said the plaintiff might maintain an action to recover a reasonable compensation for his services. These last words are quoted and italicised by Justice DIXON in his opinion in *Jilson v. Gilbert, supra.*

Considering the case last cited and considering this case from the viewpoint of the law of contracts above referred to as found in the cases and text-books mentioned, we must hold that the promisee suing to recover for a breach of agreement to provide for him by will, where the services are performed prior to the promise so to provide, is entitled to recover only

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the reasonable value of the services so performed. The parties may offer the testimony of any competent witness or other evidence of the amount agreed to be paid by legacy as having some evidential bearing on the reasonable value of the services where the disparity is not too great, but this is not at all conclusive upon the court or jury. The true inquiry always is, in cases like this, What is the reasonable value of services performed and the amount of money paid to or to the use of decedent at his request? and the amount so ascertained with interest at the legal rate will be the amount of recovery.

The judgment of the majority of this court is that the respondent's recovery is not barred under sec. 4243, Stats. (1898), notwithstanding the agreement to compensate by legacy was not in writing. This agreement is not regarded as a new promise within the meaning of that statute, but an independent and substitutionary contract within a rule which they derive from *Jilson v. Gilbert, supra,* and which is clearly stated in *Devine v. Murphy,* 168 Mass. 249, 46 N. E. 1066, and applied in *Davis v. Teachout's Estate,* 126 Mich. 135, 85 N. W. 475. On this point Mr. Justice MARSHALL, Mr. Justice VINJE, and the writer yield with some reluctance to this view.

The judgment appealed from must be reversed, and the cause remanded with directions to try and determine the question of the reasonable value of the services performed for and the amount of money paid out at the request of decedent, and award a recovery against the estate for the amount so ascertained.

By the Court.—It is so ordered.

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STATE EX REL. MUELLER, Respondent, vs. THOMPSON, City Clerk, Appellant.

April 8—May 14, 1912.

Constitutional law: Powers of legislature: Granting and amending municipal charters: Delegation of power: "Home rule" act.

1. The fundamental law embodies those principles, some in form of declaration, others by way of implied or express prohibition, and some in the form of grant, supposed to be limitations essential to conserve human liberty, security, equality, and happiness, and not to be subject to change except in a way calculated to arouse the highest judgment and most efficient deliberate considerate choice.
2. Each of the three distinct departments of government,—executive, legislative, and judicial,—is supreme in its sphere; outside thereof is usurpatious, and that of the judiciary includes power to dominate, efficiently, as regards marking the precise boundaries of each and remedying invasions by either of the territory of the other.
3. The sole power to make law is lodged in the legislature with competency, however, to exercise it, by adopting an enactment, complete in itself, and prescribing the conditions under which it shall be vitalized, as by a vote of the people at large or those of a particular district, according to circumstances.
4. The power to grant municipal charters is an attribute of sovereignty, exercisable, anciently, solely by the personal sovereign, then by his legislative body by his consent. Here the people succeeded to that prerogative power and, by the fundamental law, made the legislature the repository thereof.
5. The power to make, change, or repeal municipal charters was legislative in character by the common law in force when the state was admitted into the Union and so expressly retained by sec. 13, art. XIV, in the general retention of our common-law system, as a whole, to remain in force till changed by the legislature in the constitutional way.
6. Power of the legislature to change the common law, in force in this state when the constitution was adopted, is limited, respecting municipal charters, by sec. 1, art. XI, which, in form, grants thereto power to form municipal corporations, which, by necessary implication, includes power to grant municipal char-

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ters, fixing all fundamentals with reference to the special city government and prohibits exercise of such power otherwise, under the rule *Expressio unius exclusio alterius.*

7. Sec. 32, art. IV, of the constitution commanding legislative provision for the transaction of any business, the doing of which by special legislation is prohibited by sec. 31 of such article, contemplates a legislative effort, in general, such as by the enactment of a law to be passive until made active by a vote of the people of any district authorized to act on the question,—not delegation of power to the people at large or of districts, or a district, according to circumstances, to do the business.
8. The idea embodied in sec. 31, art. IV, of the constitution, as to city charters, is that they shall be uniform throughout the state, as near as practicable, which would be violated by affording cities capacity to create want of uniformity by the exercise of authority, in severalty, to make, change, and repeal their charters.
9. The power, in form, delegated by ch. 476, Laws of 1911, by the language, "Every city, in addition to the power now possessed, is hereby given authority to alter or amend its charter, or to adopt a new charter," is such dominating feature thereof as to render all others subsidiary thereto and dependable thereon.
10. The power so, in form, delegated is one which was within the exclusive legislative field before the constitution and confined thereto thereby.
11. The ruling feature of ch. 476, Laws of 1911, being unconstitutional, the others, forming an inseparable whole, take the cast thereof and fall therewith as invalid.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Mandamus proceeding to coerce the clerk of the city of Milwaukee to submit to its electors, under ch. 476, Laws of 1911, a proposed alteration of the city charter. The purpose of such alteration was to allow the city to conduct the business of furnishing its citizens with ice.

All conditions precedent in the law to calling a special election in respect to the matter of the proposed change were satisfied, but the clerk refused to make the call. Whereupon an alternative writ of *mandamus* was sued out to coerce him to

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do so. Such proceedings were thereafter had that appellant moved the court to quash such writ, which was overruled. This appeal followed to test the validity of such law.

Daniel W. Hoan, for the appellant.

For the state there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general, and oral argument by *Mr. Jackson.*

For the relator and respondent there was a brief by *Nohl & Nohl,* and oral argument by *Leo F. Nohl.*

On behalf of the respondent there was also a brief by *Erich C. Stern, amicus curiæ,* and *Williams & Stern,* of counsel, and oral argument by *Erich C. Stern.*

A brief was also filed by *F. C. Winkler* on the validity and scope of ch. 476, Laws of 1911.

MARSHALL, J. As indicated in the foregoing, the motion raised the issue of whether ch. 476, Laws of 1911, commonly called the "Home Rule" act, is constitutional. The trial court decided in the affirmative.

When our state government was formed, the people adopted for the paramount law, a declaration of principles modeled after the prevailing constitutions in this country. It was intended to be exact in its limitations of power, not to be open to change except in such particular and deliberate way as to render as certain as practicable that the electors desired it, evidenced by an expression of judgment after ample time and facility for investigation and maturity of thought on the subject, not to be subject to violation at all, and to create an instrumentality,—a court,—to efficiently guard it in that respect. One might exhaust his capability of using the great resources of our language in portraying the necessity for such a foundation for a people's government to rest upon,—in picturing the dignity which should be accorded to it by every department of affairs and by the people in their individual capacities, and yet leave the matter incomplete. One might

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do likewise as to the particular duty resting here to hold up the constitution safely above every act of lawmaking power which would otherwise violate it, without exaggerating the importance to the people of its faithful performance. Such performance is a judicial function, overshadowing in its significance. That it is sometimes viewed with impatience by those called to face constitutional restraints, cannot have any weight whatever as to whether the duty should be performed or not. History shows, to the great credit of average intelligent comprehension of our system of government, that firm, conservative judicial administration in the field of testing legislative enactments by the constitution, is quite sure to be approved, in general, by the deliberate judgment of the people. In no field have the people, under our form of government, won more distinction than in loyalty, in the ultimate, to their courts.

In our constitutional scheme there are three co-ordinate, substantially independent branches, namely, executive, legislative, and judicial. Each, so long as operating within its legitimate field, is supreme. It is for the court, in the ultimate, to determine whether the boundaries of a particular field have been overstepped and, if so, to nullify or stay the transgression.

The power to make law, commonly called legislative power, is dealt with by sec. 1, art. IV, of the constitution in these words: "The legislative power shall be vested in a senate and assembly." In thus limiting power to make law to the representative bodies the people, by necessary implication, parted with authority to do so directly; as the court has held, though not to determine by legislative permission whether a law, enacted in the constitutional way, shall be put into operation. *State ex rel. Boycott v. Mayor, etc.* 107 Wis. 654, 84 N. W. 242; *State ex rel. Van Alstine v. Frear,* 142 Wis. 320, 125 N. W. 961.

So, it is plain that, power to make law,—to exercise the

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function contemplated by that part of the constitution under consideration,—was reserved exclusively to the legislature, and any attempt to abdicate it in any particular field, though valid in form, must, necessarily, be held void. Just what falls within the scope of this power is not always easy to determine; but, as to a particular subject plainly recognized by the constitution as within such field, there is no room for doubt. Such is the case as to granting corporate charters to cities, as we shall see.

Sec. 1, art. XI, of the constitution vests in the legislature power to form municipal corporations by either general or special laws. Sec. 3 of such article provides that "it shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities . . . and to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such municipal corporations."

Those provisions have always been treated, and unavoidably so, as embodying the fundamental law as regards the granting of corporate charters to cities. Such a municipal corporation can only be created by a legislative act; that is by legislative charter, determining its form of government and its powers. No attempt has ever, before the act in question, been made to grant or change a municipal corporate charter, except by general or special act of the legislature, particularly covering the subject. Such has been a feature of civil government from time immemorial. Such charters, anciently, emanated from the crown as a prerogative function and went into force by consent of the community afforded the grant. Later such grants were made by legislative power by sovereign permission and went into operation with or without the assent of the community affected according to legislative purpose. The later method became, by adoption, a part of the common law

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of this country,—the prerogative power in the matter being regarded as vested in the people's representatives. At the time of the adoption of our constitution there was no way of forming a city corporation, except by act of the legislature, specifying its form of government and powers. That was entrenched in the fundamental law by sec. 13, art. XIV, providing that "such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

Thus it will be seen power to grant corporate charters for cities, to change and repeal the same, was a legislative function at common law, and made exclusively such by our constitution. While power, in general, was reserved to the legislature to change the common law it was withheld in case of reservation to the legislature of exclusive authority in a particular field, as that of granting, amending, and repealing municipal charters.

In view of the foregoing, very little need be said in testing the act in question by constitutional restrictions. As we have seen, determination of the form of government and everything appertaining to the fundamentals of a city charter are essentially legislative functions. Power in that respect was so universally regarded before the constitution and thereby the legislature was disabled from delegating it. Can one read the act under consideration and doubt that, in terms and effect, it involves an attempt at legislative abdication of that power, to a large extent? In answering that we need look but to the first section, which we quote. All which follows is subsidiary thereto and must, necessarily, fall if the substructure cannot stand the constitutional test.

"Every city, in addition to the powers now possessed, is hereby given authority to alter or amend its charter, or to adopt a new charter by convention, in the manner provided in

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this act, and for that purpose is hereby granted and declared to have all powers in relation to the form of its government, and to the conduct of its municipal affairs not in contravention of or withheld by the constitution or laws, operative generally throughout the state."

Note the two distinct grants of power: first, to alter or amend an existing charter or adopt an entirely new one; second, to exercise all powers in relation to the form of government and conduct of municipal affairs not conflicting with the fundamental or any general law. The second is subsidiary to and in aid of the first and a limitation thereof in some respects. The first is broad, with unmistakable purpose to enable any city in this state to make its organic law to suit the pleasure of its people,—to change its existing charter or make a new one without any legislative interference. The second is in the nature of a proviso to the first; that as to the mere form of government and the conduct of municipal business, the exercise of the latter shall be within the designated limitations, leaving the fundamentals of the charter, in general, to local discretion.

It seems plain that, by the first clause of the section, there is indicated, with great clearness, a purpose to delegate power to make law of the nature which was clearly reserved to the legislature, and that in the means attempted to be afforded in aid thereof, there is likewise a manifest purpose to delegate authority which the constitution so reserved. The form of a city government is of vital importance,—the very foundation stone of the creation.

It is not intended to suggest that there was any intent on the part of those responsible for placing the enactment on the statute book to violate the constitution. It is one thing to misconceive or fail to appreciate constitutional limitations, and quite another to intentionally act in violation thereof. One may do the former in the utmost of good faith and intended fidelity to his oath of office. Unconstitutional enact-

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ments have occurred from time to time, attributable to the former cause, but rarely, if ever, rightly attributable to the latter. So it happens, as we venture to say, that the good faith, characterizing a legislative enactment such as we have under consideration, which it is our duty and pleasure to accord to a co-ordinate branch of the state government, in general, invites, as it were, and approves careful, firm performance of duty here to test such enactments by constitutional safeguards and guarantees willing submission to the result. It is only through such deference by each co-ordinate branch of our system to the other, and submission to and commendation of conscientious, firm, full performance of duty, that the people may enjoy the blessings intended to be secured by our constitutional system.

The only room, it seems, there could be, as an original matter, for fair doubt as to the illegitimacy of a delegation of power to create, amend, or repeal corporate charters, is in the fact that, accompanying sec. 31, art. IV, of the constitution,—adopted in 1871, except the ninth subdivision relating to towns, cities, and villages added in 1891, prohibiting the incorporation of any city, town, or village or amending the charter thereof by special laws,—sec. 32 of such article was adopted declaring that "The legislature shall provide general laws for the transaction of any business" within the prohibition of "section thirty-one," such laws to "be uniform in their operation throughout the state." Whether it was intended thereby to authorize the legislature, by a general law, to delegate the power theretofore exercised by the legislature in regard to granting corporate charters by special act to some local body or the people themselves; or whether the intent was that the constitutional mandate should be exercised by the legislature making a law complete in itself forming the whole or part of a general charter system and leaving it with the community desiring to be a city corporation to adopt the general charter law and with an existing city to adopt it or any com-

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plete part thereof in place of its charter or portion of it,—was a subject for thought in *State ex rel. Boycott v. Mayor, etc.* 107 Wis. 654, 84 N. W. 232. The conclusion was that the change in the constitution did not take the function of making the fundamental law for cities from the legislature, or give authority to delegate it; that "transaction of any business" prohibited, within the meaning of the language used, goes no further than some method of adopting a law formulated and enacted by the legislature. The idea that the amendment contemplated delegating authority to do the business in the sense of making the law itself, was, by necessary implication at least, repudiated. The court said, in effect, that any exercise of power in the matter by an existing municipal corporation further removed from direct legislative interference than by adopting a corporate charter or a complete sub-part thereof covering a subject, as formulated by the lawmaking power, would be legislation by the corporation and not by the legislature, and so inhibited by the constitution.

True, the precise question here was not discussed or treated in the opinion of the court in the case mentioned; but the plain logic of the decision is that a legislative delegation of authority to make a city charter, or any part of it,—a power other than to adopt a legislative creation,—would be a delegation of legislative power and so void. The writer deemed a contrary view, at least as to special city charters, of sufficient merit to warrant discussing it at length to aid in reserving the question for future consideration in case of a situation being presented in which it might be vital. The case then in hand was not thought to be such. In the years which have since elapsed the writer has come to the conclusion that the logic of the court's decision, carried to its fullest extent, is right. So while, if the question were open as to whether the legislature can properly delegate power to make or change a city charter, in the sense of determining the form of government and the fundamentals, in short, except by the option law method, it

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would have to be answered in the negative, it should be regarded as thus ruled by *State ex rel. Boycott v. Mayor, etc., supra,* and subsequent cases.

The foregoing is reinforced by the plain intent of the constitution that city charters shall be uniform, throughout the state, as nearly as practicable. Before subd. 9 of sec. 31, art. IV, was adopted the general charter law was enacted. The scheme of it was to classify existing cities for general legislation and to afford opportunity, without legislative interference, to adopt an entire charter, or any portion thereof covering any particular subject, in place of an existing special charter or portion thereof. The general law and the new subdivision of sec. 31, art. IV, were companion laws to effect uniformity in city charters. The enactment in question is plainly in violation thereof. Under it facilities for changes in city charters, in number, character, and frequency, regardless of uniformity, would be immeasurably greater than under the system prior to 1891.

We thus reach a very satisfactory conclusion that the law in question is unconstitutional and so did not impose any duty upon appellant to perform that which he refused to do. We have reached that conclusion from the plain purpose of the several constitutional provisions referred to, and the likewise plain violation thereof which the enactment in question, if sustained, would accomplish. We have not found it necessary or advisable to go outside of the very narrow field indicated in order to obtain aids in reaching such conclusion, or illustrations to support its correctness. That will explain why no reference had been made to many features of the arguments of counsel who favored the court with the results of their efforts to assist.

It is correctly claimed on the one side, and not effectually, if at all, denied upon the other, that in most cases where legislation of the nature of that in question has been adopted it was preceded by a constitutional amendment expressly author-

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izing it, while in those not so preceded the legislation was condemned as unconstitutional. The most striking instance of that is found in *Elliott v. Detroit,* 121 Mich. 611, 84 N. W. 820. The court's disapproval of such attempted delegation of authority as we have here was expressed very emphatically and without qualification. Such an enactment, as there indicated, has no support whatever in the competency of the legislature to delegate limited powers of local legislation of an administrative character, to cities. All such regulations are, in a broad sense, within the fundamental lines of the legislative charter. The difficulty here is in the attempted delegation of power to make, change, or repeal the charter itself. The distinction between such a power and authority universally exercised by cities before the constitution and preserved under it,—to enact by-laws or ordinances in the administration of specific charter powers, is quite marked and commonly understood.

The result of the foregoing is that the order appealed from must be reversed, and the cause remanded with directions to sustain the motion to quash the alternative writ and to dismiss the *mandamus* action with costs.

By the Court.—So ordered.

TIMLIN, J. (*concurring*). The order does not prevent a judgment from which an appeal might be taken nor is it the final order in a special proceeding, but it may, I think, be considered an order overruling a demurrer. Sec. 3069, Stats. (1898); *State ex rel. Neeves v. Wood Co.* 41 Wis. 28; *Flannigan v. Lindgren,* 122 Wis. 445, 100 N. W. 818. Attempting to act under ch. 476, Laws of 1911, the common council of the city of Milwaukee, by a two-thirds vote of its members, adopted a resolution that:

"The charter of the city of Milwaukee is hereby altered and amended by adding to ch. 4 thereof a new subdivision which shall read:

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"Sec. 1. The city of Milwaukee is hereby authorized and empowered to establish, maintain, and operate a plant for the manufacture, purchase, and sale of ice and the distribution thereof to its citizens under such terms and pursuant to such regulations as may be prescribed by the common council of said city. The common council of said city is hereby authorized to prescribe such terms and to formulate and adopt such regulations concerning the manufacture, purchase, and sale of ice and the distribution thereof to its citizens as it may deem just and proper.

"Sec. 2. The said city of Milwaukee is hereby authorized and empowered to acquire by gift, grant, or purchase for the purposes aforesaid, suitable lands, buildings, machinery, and equipment to operate and maintain an ice plant and for the keeping, transportation, and distribution of ice under such terms and pursuant to such regulations as may be adopted by the said common council.

"Sec. 3. The said common council is hereby authorized to raise and provide all necessary money and other means for all the purposes aforesaid. Such purpose is declared to be a public purpose.

"Sec. 4. All provisions of the charter and ordinances of the said city of Milwaukee conflicting herewith are hereby modified and repealed so as to give full force and effect hereto."

Ch. 476, Laws of 1911, as amended and corrected by sec. 95, ch. 664, Laws of 1911, is a statute which attempts to put in force that condition of city government popularly and vaguely described as "home rule." This subject of home rule for cities is new in Wisconsin. Statutes on the subject have been enacted in Louisiana and Michigan in advance of any amendment to their state constitutions, and several state constitutions have been amended for the purpose of enabling the legislature to confer this power upon cities. Among the states which have adopted such constitutional amendments are California, Michigan, Minnesota, Missouri, Oklahoma, Oregon, and Washington. The reasons urged by the advocates of this plan of city government are: (1) that it will obviate the evil of unwise legislative intermeddling with the local affairs of

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cities; (2) that it will foster and develop among the electors of the city a sense of responsibility and a knowledge of local municipal affairs; and (3) that such electors have a better knowledge than legislators selected from the entire state concerning local affairs and local conveniences or necessities.

About twenty years ago in this state it was thought the legislature interfered too frequently by special laws in the government of cities, and the state constitution was amended so as to forbid the legislature to enact any special or private law for incorporating a city or to amend its charter. The legislature was thus powerless to act in such matters except by general legislation. But such classification of cities was of necessity and by decisions of this court permitted that there was, with reference to the largest city in the state, about the same freedom of legislation as formerly. The acts of the legislature merely took the form of general legislation for a class of cities. It is said that in Minnesota a like constitutional restriction upon the enactment of special laws produced an opposite result. *State ex rel. Getchell v. O'Connor,* 81 Minn. 79, 84, 83 N. W. 498. But too little legislative power in Minnesota and too much in Wisconsin alike begot a desire for "home rule." Thus either too little or too much legislative power in this respect would appear to be inconvenient or undesirable, as certain disorders of the stomach may be caused either by surfeit or by famine. Much crude and ill-digested information on this subject is printed and published by advocates and antagonists more enthusiastic than thoughtful, and considerable pseudo-scientific exposition of the subject may be found in pamphlets, addresses, and books.

We must expect to have many new theories of government and some experiments made in a country which attempts to give a partial education to all its citizens and in which practically unlimited suffrage prevails and whose people are active, alert, and progressive. The theories advanced may have been investigated and rejected or even experimented with and

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rejected centuries ago, but they are new to most of the electors, and the enthusiastic propagandist obtains an audience and a following. This is very irritating to the citizen who is disposed to sleep at his post of citizenship; to the citizen whose profits are threatened thereby; and to the citizen who reveres old things merely because they are old. Hence the ever-recurring and irrepressible conflict. But those can look on, impartial and entertained, who know that in all things, old and new, good and evil are combined; that the law of this world is struggle, and that balance is preserved only by action of opposing forces; that no legal rule or institution exists without having had at its origin a cause for its existence; that if that cause has passed away the institution cannot be upheld; and that if that cause still exists it will bend and warp all innovation to harmonize with it and vindicate itself through the same force that brought the ancient rule into being in the first instance.

It is obvious and elementary that there can be but one sovereign power in the government of a state. As well might we speak of two centers in a circle as two sovereign powers in a state. Sovereignty, however, may be so divided or distributed that several officers or departments of government must each act in its full exercise. This division of power is at the basis of the check-and-balance theory of government. It is essential to liberty, and it obtains with modifications in detail in all enlightened governments. Or sovereignty may be otherwise divided so that there is a dual government, each supreme in the same territory, but in certain separable and specified matters, and of this the mediæval governments, where the church was sovereign in ecclesiastical and the state in secular matters, constitute examples. Or sovereign power may be divided with reference to the matters to be acted upon so that there are two sovereigns in the same territory, but each over different matters, and in each of these sovereignties there may exist the division or distribution of sovereign power into sepa-

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rate departments which must all join in its full exercise. And of this, most federal forms, like that of the states and the United States, Canada, and to some extent Germany, constitute examples. Where sovereign power is distributed among officers or departments there may be some encroachment of one department upon another or there may result an *impasse;* action is slow, efficiency is not great, but there is liberty. Where the division of power is with reference to subjects of regulation, a clash is inevitable unless there is some authority or overlord empowered to determine what matters belong under the jurisdiction of each sovereign, because it is impossible to specify in advance the unknown or unforeseen. That government possessing this power is the real sovereign. Two opposing theories of the origin of this sovereign power prevail and appear in written constitutions. One is that the full sovereign power was originally vested in an autocrat, and he has granted to the people a constitution but still retains all sovereign power not thus granted. This is the theory of the constitutions of Prussia and, I think, of most of the other states of Germany, and its result with reference to cities which are not states is that the administrative department of the government, which is a branch of the executive, interferes with the local government of cities promptly and efficiently by disapproval of their choice of city officers and veto upon their exercise of any power not granted away by the autocrat when he gave his people the constitution or given by anterior executive grant to the city or long user presupposing a grant. The other theory is that sovereign power resides in the people, who form their own constitutions, limiting, as therein provided and to a greater or less extent, the power of all their officers and their own power to change the constitution except in the manner provided therein. All persons and institutions in a state of this kind are subject to laws made conformably to the constitution, and the consequence is that under such conditions the legislature, representing the people, has the power

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to interfere in the government of cities as the executive may in Prussia and other German states. To some this executive interference by one autocrat seems infinitely better than legislative interference by the majority voice of 133 autocrats; but I think it will be found that the basic difference between municipal government in Europe and that in this country rests upon the fact that here the man who pays no taxes and he who would be considered in continental Europe a temporary sojourner or a transient is permitted to vote and so indirectly control the fiscal affairs of the municipality, while there such persons are not electors of the city and have no voice in such affairs. There, also, the law frequently prescribes necessary qualifications or conditions of eligibility to city offices; here there is no such thing. There may exist a city-state possessing many of the powers of sovereignty, and that state may have its local government include a small adjoining rural area and be a member of a confederacy with other states and represented in the federal or national congress, like Lubeck, Bremen, and Hamburg in the German federation. Or the city may be the sole and absolute sovereign within its boundaries and over its dependencies like the old city-states of Rome, Carthage, or Venice. But neither of these forms of city government is possible in this country under our national and state organizations. Here a city is only possible as an administrative agency of the state, having a measure of local legislative or ordinance power and a limited proprietary capacity. There is no instance, I think, in history where such civil divisions have been authorized to exercise absolute home rule except that of the communal law of France of 1789, which was attended with disastrous results. All laws relating to the autonomous government of cities in this country, in order to be valid, must fit into our fundamental conditions of government, and in order to be successful must not only be valid but also appropriate to sociological and political conditions existing here, not to those existing elsewhere, and they

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must respond to our changing conditions and to constitutional rights of the citizens affected thereby.

In *Straw v. Harris,* 54 Oreg. 424, 103 Pac. 777, the court considered sec. 2, art. XI, of the constitution of Oregon as amended in 1906. That reads as follows:

"Sec. 2. Corporations may be formed under general laws, but shall not be created by legislative assembly by special laws. The legislative assembly shall not enact, amend, or repeal any charter or act of incorporation for any municipality, city, or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the constitution and criminal laws of the state of Oregon."

This seems to exclude all state laws except the criminal laws. The court said:

"The language used in the amendments considered would appear to give incorporated cities the exclusive control and management of their own affairs, even to the extent, if desired, of legislating within their borders without limit, to the exclusion of the state. But, as stated, these provisions must be construed in connection with others of our fundamental laws, which can but lead to the conclusion above announced; and whatever may be the literal import of the amendments it cannot be held that the state has surrendered its sovereignty to the municipalities to the extent that it must be deemed to have perpetually lost control over them. This no state can do. The logical sequence of a judicial interpretation to such effect would amount to a recognition of a state's independent right of dissolution. It would but lead to sovereigntial suicide. It would result in the creation of states within the state, and eventually in the surrender of all state sovereignty—all of which is expressly inhibited by art. IV, sec. 3, of our national constitution. Power to enact local legislation may be delegated, but this of necessity, whether stated or not, is always limited to matters consonant with, and germane to, the general purpose and object of the municipalities to which such prerogatives may be granted. Municipalities are but mere departments or agencies of the state, charged with the performance of duties for and on its behalf, and subject al-

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ways to its control. The state, therefore, regardless of any declarations in its constitution to the contrary, may at any time revise, amend, or even repeal any or all of the charters within it, subject, of course, to vested rights and limitations otherwise provided by our fundamental law."

I think this is a correct statement of the law as it is and as it must finally prevail. It can in no way be avoided so long as our present system of federal and state governments obtains and so long as those underlying forces operate which always tend to lodge ultimate authority and sovereign power with him best able to exercise it and whose position makes him the final arbiter of his own claim to such power. This is the state, not the city. There can be no absolute autonomy in American cities no matter how limited as to subject.

We may now leave for a space these larger observations and come down to the details of the legislation of several states upon this subject, the questions which arose, and the disposition which was made of them. These instances will serve to draw away the mind from mere theorizing and disclose some of the points of friction as well as some of the impending or threatened effects of such laws.

The experience of California in this respect is instructive. The constitution in force in that state in 1880 authorized any city containing a population of more than 100,000 to frame a charter for its own government, consistent with and subject to the constitution and laws of the state, by causing a board of fifteen freeholders to be elected who should prepare and propose a charter which must be submitted to the qualified electors of said city, and, if a majority of the latter ratify the same, submit it to the legislature for its approval or rejection as a whole, and if approved by a majority vote of the members elected to each house it should become the organic law of the city and supersede any existing charter and all amendments thereof and all special laws inconsistent with such charter. It was decided that the purpose of this section

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was to emancipate municipal governments from the authority and control formerly exercised over them by the legislature (*People v. Hoge,* 55 Cal. 612); that the legislature could not abridge the right given by these provisions to cities (*People ex rel. Johnson v. Bagley,* 85 Cal. 343, 24 Pac. 716); that a city might provide in its charter for taxation for municipal purposes (*Security Sav. Bank & T. Co. v. Hinton,* 97 Cal. 214, 32 Pac. 3). This constitution apparently proved unsatisfactory, and it was amended in 1887 by providing that such charter or amendment thereto, or any alternative article or proposition, might be presented for the choice of the voters and voted on separately; by including a consolidated city and county having a population of more than 10,000 and not more than 100,000; and in other respects. This constitution was again amended in 1902 so as to include cities containing a population of more than 3,500 and permitting fifteen per cent. of the qualified voters of the city to petition the legislative authority of the city to submit any proposed amendment or amendments to said charter to the qualified voters thereof for approval. This constitution was again amended in 1906 in this respect. All these amendments retained the feature of the first California constitution requiring the election of a board of fifteen freeholders whose duty it should be to prepare and propose a charter for the city and requiring the submission of the charter to the legislature for approval after its approval by the electors of the city. Considerable difficulty was experienced and some confusion occasioned by a constitutional amendment to sec. 6, art. XI, adopted in 1896, which read: "All charters thereof framed or adopted by authority of this constitution, *except in municipal affairs,* shall be subject to and controlled by general laws." A municipal affair was defined in *Fragley v. Phelan,* 126 Cal. 383, 58 Pac. 923, as one which related to the internal business affairs of the municipality, and that the election of the freeholders for framing of the charter was not a municipal affair. Salaries

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of officers of the police and fire departments of a city are municipal affairs. *Popper v. Broderick,* 123 Cal. 456, 56 Pac. 53. The control of the almshouse of San Francisco is a municipal affair. *Weaver v. Reddy,* 135 Cal. 430, 67 Pac. 683. The functions of the board of health are municipal affairs. *People ex rel. Lawler v. Williamson,* 135 Cal. 415, 67 Pac. 504. A statute forbidding the imposition of a license tax for the purpose of revenue deals with a municipal affair. *Ex parte Helm,* 143 Cal. 553, 77 Pac. 453. The registration of voters for a municipal election is a municipal affair. *People ex rel. Martin v. Worswick,* 142 Cal. 71, 75 Pac. 663. A section in a city charter conferring upon the city power to impose license taxes for the purpose of revenue relates to a municipal affair and is paramount to a general statute forbidding such taxes. *Ex parte Braun,* 141 Cal. 204, 74 Pac. 780. In this case it appears that the city of Los Angeles, under this constitutional power, imposed a license tax upon the great majority of callings and occupations in the city, including callings or occupations in no degree subject to police regulation, sometimes basing the amount of tax upon the amount of business transacted. Braun was a wholesale liquor dealer and it imposed upon him a tax of $60 per month. These occupation taxes were upheld, Justices BEATTY and LORIGAN dissenting. Justice MCFARLAND says: "The section of the constitution in question uses the loose, indefinable, wild words, 'municipal affairs,' and imposes upon the courts the almost impossible duty of saying what they mean." Chief Justice BEATTY, discussing the statement in the opinion of Justice ANGELLOTTI that "when a power is conferred upon a municipality for municipal purposes that power becomes a municipal affair," calls attention to the fact that the definition does not define or render any more definite or understandable the words of the constitution. Justice MCFARLAND said: "It is difficult to realize that the people of the state, through their legislature, have no longer the power to say that a license tax—

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a tax upon the right to do business, a tax upon capacity—is unjust, unequal, and oppressive, and should not be tolerated anywhere within the state; but we think such is now the law." This case shows what may take place under a constitutional grant of this kind. The school system is a matter of general concern and not a municipal affair. *Hancock v. Board of Education,* 140 Cal. 554, 74 Pac. 44. The payment of fees to jurors in criminal actions is not. *Jackson v. Baehr,* 138 Cal. 266, 71 Pac. 167. A county affair is not a municipal affair. *Popper v. Broderick, supra.* The opening of streets in a city is a municipal affair. *Byrne v. Drain,* 127 Cal. 663, 60 Pac. 433. The issuance of bonds for the repair of existing school houses and for a new school house is a municipal affair. *Law v. San Francisco,* 144 Cal. 384, 77 Pac. 1014. The collection of fines for misdemeanors punishable under state law is not a municipal affair. *Marysville v. County of Yuba,* 1 Cal. App. 628, 82 Pac. 975. The fixing of the boundaries of a territory to be annexed to a city or town is not a municipal affair. *People v. Ontario,* 148 Cal. 625, 84 Pac. 205. Nor the trial and punishment of offenses defined by the laws of the state. *Robert v. Police Court,* 148 Cal. 131, 82 Pac. 838.

These words are not as ambiguous in the California constitution as they are in ch. 476, Laws of 1911, for the reason that the California constitution, art. XI, sec. 8½, by expressly conferring upon the municipality certain designated powers, unmistakably makes these subjects municipal affairs. One is the constitutional regulation governing the manner of selection and the compensation of police court judges and their clerks and *attachés;* another the manner, times at which, and terms for which, members of the boards of education shall be elected or appointed and the number of such members; and another confers similar powers with reference to boards of police commissioners. There is also enumerated government of the municipal police force and the selection, compensation,

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regulation, etc., of boards of election and clerks and their *attachés*. These, together with some other constitutional powers and the existing powers conferred by general statutes upon municipal corporations, cover the subjects described as "municipal affairs" to a considerable extent. It is said in *Security Sav. Bank & T. Co. v. Hinton,* 97 Cal. 214, 32 Pac. 3, quoting from *U. S. v. New Orleans,* 98 U. S. 381, 393: "When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited." Where the legislature controls the city, this subject is regulated by express delegation of power, supplemented by a rule of the common law that the city possesses no power not thus delegated or necessarily implied from the delegated power. Licensing horse races may be a municipal affair if the municipality has power from the state to tax and regulate that sport. *Alexander v. Elizabeth,* 56 N. J. Law, 71, 28 Atl. 51. So licensing all occupations would include the licensing of the retail sale of liquors. Full power to tax for municipal purposes or for municipal affairs, together with the power to determine what affairs were municipal affairs, would include the power to destroy property or make the license fee burdensome to the point of suppression upon some or all professions or occupations. Those Californians who sought refuge from legislative meddling with city charters in a constitutional amendment must have since experienced a good deal of constitutional intermeddling, judging from the frequent changes in the state constitution.

No doubt the words "municipal affairs," "municipal concerns," or "municipal purposes" *in a constitution* could be handled by a slow process of inclusion and exclusion until some workable theory of local government could be developed, but this promises a long period of uncertainty and a multiplication of legal questions and local quarrels and does not seem to possess much advantage over the older system. If, on the

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other hand, the constitution is so framed as to prevent the legislature from interfering with the city charter (assuming that could be done), the consequence must be that instead of executive interference as in Germany, or legislative interference as heretofore in the United States, we will develop a system of judicial interference, because of the constantly recurring necessity for construction to determine what subjects are within and what without the local power. There also must be a great variety of city charters if each charter is to be made and enacted by the electors of each municipality according to their different notions, and, unless the restriction is contained in the constitution, any provision of statute by which the so-called home rule charter is made subject to the laws of the state will not prevent local differences, appeals to the paramount legislature, nor prevent legislation by the latter changing and undoing what has been done by the locally adopted charter, for no legislature can tie the hands of succeeding legislatures.

The Missouri constitution of 1875 is perhaps the first and typical to some extent of other home rule constitutional provisions. The city "may frame a charter for its own government, consistent with and subject to the constitution and laws of this state. . . . But such charter shall always be in harmony with and subject to the constitution and laws of the state." Sec. 16, art. IX. When conflict as to mere municipal regulations, such as assessment of benefits and damages arising from grading streets, exists between such charter and the general laws of the state, the former supersedes the general laws on that subject (*Kansas City v. Marsh Oil Co.* 140 Mo. 458, 41 S. W. 943), but not in police matters (*State ex rel. Goodnow v. Police Comm'rs,* 184 Mo. 109, 88 S. W. 27), nor as to occupation licenses (*Kansas City v. Lorber,* 64 Mo. App. 604); nor to the regulation of telephone rates (*State ex rel. Garner v. Missouri & K. T. Co.* 189 Mo. 83, 88 S. W. 41), nor to create a right of civil action between citizens *inter sese*

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(*Sluder v. St. Louis T. Co.* 189 Mo. 107, 88 S. W. 648). Such charter is subject to legislative control. *Ewing v. Hoblitzelle,* 85 Mo. 64; *State ex rel. Kansas City v. Field,* 99 Mo. 352, 12 S. W. 802. The charter can contain only provisions essential to a city government. Within that scope the charter so adopted has the force of an act of the state legislature. *State ex rel. Abel v. Gates,* 190 Mo. 540, 548, 89 S. W. 881. But the charter may authorize the local legislative body of the city government to compel the attendance of witnesses and the production of books and other documents relating to any subject under investigation in which the interests of the city are involved, and an ordinance enacted under such charter power may authorize the city council to imprison for contempt for failure to attend and produce books of account. *In re Dunn,* 9 Mo. App. 255. It is also ruled in Missouri that if the constitution confers upon a city the power of eminent domain, the city by adoption of a home rule charter may regulate the exercise of such power, but it could not by such charter confer this power upon itself. *Kansas City v. Marsh Oil Co.* 140 Mo. 458, 41 S. W. 943. The constitution merely transfers to the people of the city power to legislate in purely municipal affairs. *Morrow v. Kansas City,* 186 Mo. 675, 85 S. W. 572. The power to require the production of documents under such vague general issues and the power to imprison for contempt seem extraordinary and liable to abuse, while the ruling relating to occupation licenses seems to conflict to some extent with the California rulings on the same subject hereinbefore noticed. But on the whole it seems that the government of Missouri cities has not been much changed or benefited by this change of the state constitution.

The constitution of the state of Washington authorizes certain cities to adopt their own charters consistent with and subject to the constitution and laws of the state. Art. XI, sec. 10. General laws cannot be affected by such charter (*Seymour v. Tacoma,* 6 Wash. 138, 32 Pac. 1077); nor can

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the city under this power provide a tribunal and clothe it with authority to try contested election cases (*State ex rel. Fawcett v. Superior Court,* 14 Wash. 604, 45 Pac. 23); nor can the city under such charter fix the price of gas to be furnished its citizens or inhabitants (*Tacoma G. & E. L. Co. v. Tacoma,* 14 Wash. 288, 44 Pac. 655). The state may nevertheless pass laws relating to the assessment and collection of taxes in such city, because the state has an interest and duty in the collection of a tax levied by the city. *State ex rel. Seattle v. Carson,* 6 Wash. 250, 33 Pac. 428. But a city may not confer upon itself power to extend its boundaries, but must do so under existing general laws. *State ex rel. Snell v. Warner,* 4 Wash. 773, 31 Pac. 25.

The constitution of Minnesota as amended in 1898 authorizes cities to frame their own charters, which must be consistent with and subject to the laws of the state. Sec. 36, art. IV. "Such charter shall always be in harmony with and subject to the constitution and laws of the state of Minnesota." Id. An amendment to this part of the constitution was proposed by the Minnesota legislature of 1911. The power thus given embraces any subject appropriate to the orderly conduct of municipal affairs. *State ex rel. Barber A. P. Co. v. District Court,* 90 Minn. 457, 97 N. W. 132. Under this power the city may enact ordinances relating to the bonds of contractors and payment of laborers and materialmen, including the contents of the bonds and conditions and limitations as to their enforcement, differing in detail from the requirements of existing general laws. *Grant v. Berrisford,* 94 Minn. 45, 101 N. W. 940, 1113. The city may also regulate the manner of presenting claims against itself, auditing and allowing the same, and regulate the proceedings for reviewing the same upon appeal. It is said that these are "municipal affairs." *State ex rel. Barber A. P. Co. v. District Court,* 90 Minn. 457, 97 N. W. 132. I should regard this case as going very far if it includes the regulation of the

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appeal procedure. If such cities have the power of eminent domain, the home rule charter may prescribe means for its exercise and impose duties on the courts of the state in the condemnation of property. *State ex rel. Ryan v. District Court,* 87 Minn. 146, 91 N. W. 300. Notwithstanding the home rule charter, a general law restricting the municipalities from contracting indebtedness in excess of five per cent. of the value of the taxable property of the city remains in force. *Beck v. St. Paul,* 87 Minn. 381, 92 N. W. 328. Under such charter the city council may supersede the general laws of the state relative to local assessments for street improvements (*Turner v. Snyder,* 101 Minn. 481, 112 N. W. 868), and may regulate the manner of filing claims against the city before bringing action thereon (*Peterson v. Red Wing,* 101 Minn. 62, 111 N. W. 840).

In Michigan the legislature attempted to delegate to cities by legislation resembling ch. 476, Laws of 1911, containing somewhat similar vague general words, power to amend their charters, but the supreme court of that state held the act unconstitutional as an attempt to delegate wholesale unqualified and undefined authority to the mayor and electors of the city. It was considered that the legislature must itself determine what powers the municipality shall have, and not leave it to the electors residing in the municipality to determine what legal power the latter should have. *Elliott v. Detroit,* 121 Mich. 611, 84 N. W. 820. The state constitution was then amended (art. VIII, secs. 20–25) so as to require the legislature to provide by a general law for the incorporation of cities, and by another general law for the incorporation of villages, and such general laws must limit their rate of taxation for municipal purposes and restrict their powers of borrowing money and contracting debts. "Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and, through its regularly constituted authority, to pass all laws and ordinances

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relating to its municipal concerns, subject to the constitution and general laws of this state." Sec. 21. The next section of the Michigan constitution expressly confers upon cities certain powers relating to parks, boulevards, cemeteries, hospitals, almshouses, and all works which involve the public health or safety. The next two sections confer power to acquire, own, and operate public utilities for supplying water, light, heat, power, and transportation, with certain limitations not relevant here. The next confers the power to incur debts for the acquisition or operation of public utilities with certain restrictions and limitations. The next is negative and forbids the city to abridge the elective franchise, to loan its credit, to lay a tax for other than a public purpose, etc. It will be observed that the constitutional grant is hedged in by certain safeguards, and that while the vague words "municipal concerns" are used, still these things, or the most important of them, are specified in the constitution, and these specifications furnish something definite to which the words "municipal concerns" may be applied and from which they may be extended, *"noscitur a sociis."* In this way a home rule charter properly limited may be made intelligible and effective. The statement, in general terms at least, of what are municipal affairs or municipal concerns is indispensable to intelligibility wherever the limitation "subject to the constitution and laws of this state" occurs. For otherwise we move around to our starting point. Under home rule amendments to the constitution thus guarded the city of Detroit undertook to amend its charter so as to authorize it to own and operate the street railways. The attorney general attempted to restrain by *mandamus* the submission of such amendment to the electors of the city and prevailed on the ground that a revision of the charter so as to make it contain the restrictions and limitations found in secs. 3 and 5 of ch. 279, Public Acts of Michigan for 1909, should precede such submission. The court upholds the law, but the city in attempting to amend its char-

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ter failed to proceed properly so as to take on with the enlarged power the legislative and constitutional limitations restricting the rate of taxation, etc. In upholding the law the court said: "It should also be remembered constantly that 'home rule' is the fundamental purpose of the amendments and that cities can only become financially ruined by accomplishing such ruin themselves." *Att'y Gen. ex rel. Hudson v. Common Council,* 164 Mich. 369, 380, 129 N. W. 879. To me this is a surprising sentiment, a most unusual consolation to the court. What of the citizens whose property is swept away by such ruin accomplished by the votes of perhaps an irresponsible and non-taxpaying majority? Home rule even with reference to local matters and universal suffrage, in industrial cities where the non-taxpaying electors are in a majority, cannot, I think, exist together, without legislative interference, or at least without judicial interference, which will be found quite as frequent and quite as objectionable to the defeated party as the old legislative interference from which he sought to escape. So long as the paramount law charges the courts with the duty of protecting personal and property rights, and so long as there will exist under such home rule charter a tendency to encroach upon these rights, there will be judicial interference either of the state or federal judiciary or both. So we have of interference in municipal regulations this progress: executive interference, legislative interference, judicial interference. But there always is and must be interference of some kind unless the city is sovereign. We may indulge in vague generalities about "home rule in municipal affairs," but reflection and analysis must disclose that in so far as the city is engaged in the exercise of the taxing power or in the power of incurring obligations which must be met by taxation, so far as it may deny the equal protection of the laws, unreasonably restrain liberty, or proceed without due process, the sovereign power must always, in some form or through some department of the government, inter-

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fere with and restrain the city. The numerous instances referred to tend to illustrate at what points and upon what subjects the authority of the city in the exercise of its purely local or corporate powers will conflict with personal or property rights of others. Each citizen has, under the United States and the state constitutions, a bill of rights for his protection. These may be infringed as well by local regulations as by state-wide regulation. The area in which the regulation is in force has nothing to do with this. Neither has the fact that the regulation relates to a city obligation or duty rather than to a state obligation or duty. There can be no home rule which is worth considering without the power of taxation on the part of the city for city purposes, and there can be no taxation under our system without getting into the field of general law and constitutional rights. Neither can there be any taxation not subject to regulation by the master hand of the state legislature. Where "sovereignty" or even "control" is by constitution or statute distributed between the state and the city with reference to the subjects of regulation by each, if the city were sovereign in all "municipal affairs" and the state in all other affairs, still the city could not conclusively determine what affairs are "municipal," for to permit it to do so would be to confer upon the city an overlordship which would finally draw all power to the city. But in such case either one must have this power and that one is the state. Under our American theory of the origin and office of constitutions the state may do this through its legislature and judiciary. The former can create legal conditions, can make "affairs" municipal or state as it deems wisest or most expedient. The latter can apply these laws to concrete cases, and in attempting to do this can interpret the law only so far as is necessary to apply it to the instance or cause before the court. For illustration: the subjects of public health and quarantine regulations, highways, education, taxation, liquor or other licenses, hours of labor, street railway or gaslight rates, etc., within

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city boundaries might by one legislature be placed under the regulatory power of the city and thus become "municipal affairs." The next legislature might think it better that the state resume its exclusive authority over some or all of these and thus make them "state affairs." It would be impossible, both on account of changing conditions and because the state could not wholly abdicate its sovereign functions over such and similar subjects, to hold that that which a legislature had once made a "municipal affair" must always thereafter remain such. So it is apparent that such "home rule" tends to invite rather than prevent interference by the state in the government of cities. Whether this interference on its own initiative or on request of the city electors be direct and plain, or whether it be accomplished by legislative shifting of subjects in and out of the class called "municipal affairs," seems to be matter of form rather than substance.

Again, considering the foregoing instances, which are part only of a greater number which have occurred, the home rule law would seem to promise neither peace nor uniformity in city government. So long as the home rule charter must be subject to legislative authority in all matters, the power of the legislature to interfere in city government is not changed, nor is there anything in the situation to lessen the disposition of the legislative body to so interfere. The dissatisfied faction in the city will come to the legislature for relief after this charter is adopted as freely as before. General laws will be enacted from time to time continually conflicting with the local charter at unexpected points and creating doubt and uncertainty, and each city will by original adoption or subsequent amendment produce a charter differing in detail from that of any other city. On the other hand, if the legislature could be constantly prohibited from any interference with the so-called home rule charter adopted by the city so far as the same related to municipal affairs, this would substitute the interference of the judicial department of government for

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that of the legislative department, and every section of the charter and every ordinance must in time come before the courts in order to ascertain whether it related to a municipal affair only and so whether subject to repeal or amendment by the state legislature. Municipal affairs, however, change from time to time. The telephone was a short time ago a matter of local accommodation. Now it extends beyond the boundaries of the city and even beyond those of the state. Electric light and power plants were local utilities but a short time ago; with the development of water power and the transmission of electric current to distant points their character is changed; so has that of the street railway. 2 Wilcox, Mun. Fran. § 509. There is also a tendency in the other direction. The state may authorize a city to maintain and operate an ice plant or garbage crematory or an opera house, and immediately the maintenance and operation of these become municipal affairs. But they were not such before. As the powers of a city broaden in consequence of the constitution or the statute conferring additional powers and duties, so does the meaning of the words "municipal affairs." As the legal powers of the city narrow, so does the meaning of this phrase. But there is this difference: they can never broaden to include sovereign power in an American city, although they may narrow to zero.

So far we have dealt with constitutional law, which is of course paramount to the statute, and which may itself create certain things municipal affairs or may recognize existing municipal authority under statutes as constituting what the constitution terms municipal affairs. This, as we have seen, will present a number of difficult legal questions, but we have to do with a somewhat different situation where there is no constitutional provision and the whole question rests upon statute, as in the present case. It is perhaps worthy of remark that the same legislature which enacted the statute in question

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here, proposed by resolution No. 73 (Laws of 1911, p. 1142) an amendment to the constitution of this state as follows:

"Cities and villages shall have power and authority to amend their charters, and to frame and adopt new charters, and to enact all laws and ordinances relating to their municipal affairs, subject to the constitution and general laws of the state."

Ch. 476, Laws of 1911, as amended and corrected by sec. 95, ch. 664, Laws of 1911, provides that every city shall have authority to alter or amend its charter or adopt a new charter in the manner there specified, and for that purpose it "is hereby granted and declared to have all powers in relation to the form of its government, and to the conduct of its municipal affairs not in contravention of or withheld by the constitution or laws, operative generally throughout the state."

Sec. 2. "When a new charter shall have been adopted, or the old charter altered or amended, by any city, in the manner provided by this act, such new charter or alterations or amendments shall supersede any existing charter or statutory provision inconsistent therewith, and the same is in that event hereby repealed; two copies of such new charter or alterations or amendments, duly certified by the city clerk, shall be filed in the office of the secretary of state."

The remaining portions of the act authorize and regulate the procedure for making and amending charters and are not especially important in the instant case. It is sufficient to say that the alterations or amendments may originate with the common council or with the state board of electors and they shall be adopted by the common council and by the voters at an election or rejected by the common council and adopted by a vote of the electors, or the question of holding a charter convention for framing a new charter may in a somewhat similar manner be submitted to a vote of the electors. Delegates are chosen to frame a new charter, which becomes effective when approved by a popular vote of the electors of the city.

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It will be observed that the city is in the first section granted, for the purpose of amending its charter or adopting a new one, "all powers in relation to the form of its government, and to the conduct of its municipal affairs not in contravention of or withheld by the constitution or laws, operative generally throughout the state."

In relation either to (1) the form of government, or (2) the conduct of its municipal affairs, the city has by this statute all power not withheld (a) by the constitution, or (b) by laws operative generally throughout the state, and not in contravention (a) of the constitution, or (b) of laws operative generally throughout the state. Constitution here mentioned is the constitution of Wisconsin, and laws generally operative throughout the state must mean (1) the federal constitution, treaties, and statutes of the United States according to their true meaning as settled by judicial interpretation; (2) the statutes of the state of Wisconsin according to their true meaning as settled by judicial interpretation; (3) such parts of the common law as were in force in the territory of Wisconsin at the time of the adoption of the state constitution and which were not inconsistent with that instrument (Const. art. XIV, sec. 13). This common law is evidenced by the decisions of the courts involving common-law questions. Powers not *withheld* by either of these comprehensive bodies of law is perhaps not such a sweeping exception as powers not in *contravention* thereof. Contravention means "transgression" or "violation." So that we have a statute which gives to the city power in two fields of operation, namely, (1) in relation to the form of city government, and (2) in relation to the conduct of its municipal affairs, excepting, however, from each, such powers as are in violation of existing law. The exception seems to take away about all that is given by the granting clause of the sentence. Among the rules of law operative generally throughout the state and referable to that part of the common law continued in force by our state constitution is one to the

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effect that municipal corporations possess no powers not expressly granted to them by the legislature or included within those granted by reasonable implication. *Hasbrouck v. Milwaukee,* 13 Wis. 37; *Madison, W. & M. P. R. Co. v. Watertown & P. P. R. Co.* 7 Wis. 59; *Trester v. Sheboygan,* 87 Wis. 496, 58 N. W. 747, and authorities cited. We have no statute purporting to repeal or change this rule. It was said by counsel in argument that the furnishing of water by a city to its inhabitants is a municipal affair; that ice is but frozen water; hence the furnishing of ice must be a municipal affair. But things which are similar from a physical or chemical viewpoint may be dissimilar from the legal viewpoint; under a statute authorizing a city to buy coal it probably could not buy diamonds, although it is said they are chemically identical. Neither is atmospheric gas passed through a varying aperture and articulated by varying contacts always equivalent to argument. The difference between the collection and distribution of water by means of pipes laid in the streets and the manufacture, sale, and distribution of ice is that the first is in the nature of a monopoly, while the second is a competitive business enterprise. The first does not depend so largely upon skill in management. The legislature has expressly authorized the first and has not expressly authorized the latter. If the manufacture, sale, and distribution of ice is included in the existing grants of power to cities by reasonable implication, then it was not necessary to amend the Milwaukee charter in this respect. If it is not by reasonable or necessary implication included, then such action by the municipality is in contravention of a law operative generally throughout the state, hence forbidden by the very statute under which the relator proposes to act. There is also this further difficulty inherent in the words "municipal affairs." What are municipal affairs? The first impression is that they are the legal affairs of the city. If we wish to escape from this impression we must recast the phrase so as to describe the city by refer-

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ence to its physical peculiarities. But aside from artificial changes made by authority of law, such as streets, sewers, water pipes, wire conduits, and such like, the only distinctive physical feature of a city consists in an area of congested population. If we substitute for the expression "municipal affairs," "affairs of areas of congested population," we are able to get away from the legal view, but we encounter other difficulties. If a mere congested area can be given by the legislature power to provide for its own local government so far as such provisions are not in contravention of the constitution or laws generally in force throughout the state, the powers thus conferred would be few, feeble, and ineffective. The state laws relative to highways, taxes, police powers, licenses, and other like subjects would be in force, but the corporate entity, the juristic personality, would be lacking and must be conferred by some higher power or else a new state must emerge. The congested area could not confer political and legal existence upon itself. But the words "municipal affairs" assume the pre-existence of a corporate entity having affairs. Such juristic person exists only in the law and consequently its affairs are legal affairs, namely: the exercise of the powers conferred upon it by law. The manufacture, sale, and distribution of ice was not a municipal affair because the municipality had never been by statute authorized to embark in, conduct, or carry on such business. It could amend its charter relative to the conduct of its municipal affairs only, and this is not such an affair. The city could not make that a municipal affair which the state legislature had not made so. This statute purports to confer no new or additional power on the city so as to make that a municipal affair which was not so before the enactment. Scanning the statute still further, it appears to relate only to the *form* of the city government and the *conduct* of its municipal affairs. Making, selling, and delivering ice do not relate to the *form* of the city government. "Conduct" means "to carry on," "to manage," "to regulate,"

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"to direct the course of," and "municipal affairs" means, as we have seen, those affairs or concerns of the city which fall within its statutory and common-law powers and duties. The establishment and operation of this municipal ice plant relates, therefore, neither to the *form* of the city government nor to the *conduct* of its municipal affairs. The city cannot confer corporate existence or power upon itself, because this would be an exercise of sovereign power. Such power comes from the state. All municipal affairs, according to the definition above given, whether made such by existing law or to be made such by future statutes, are the subjects of municipal regulation. The city may by amendment to its charter or adoption of a new charter provide for the "conduct" of such affairs and nothing more under this statute. This being the scope of the power granted, the effect given to the exercise of that power, viz. "to supersede any existing charter or statutory provision inconsistent therewith," must refer not to general rules of statutory law, but to local statutes, or to statutes of the same or similar legal nature, as special city charters. The statute could not at the same time be subject to the laws operative generally throughout the state and supersede these laws. If this statute could be construed to be an attempt to confer upon the city general legislative power not only to enact laws creating municipal corporations but also to extend its own corporate powers to new subjects so as to make that a "municipal affair" which was not so under state laws, therefore to exercise full legislative power, the act would also, I think, be invalid as an unconstitutional delegation of legislative power. Const. art. XI, sec. 3. While I would not carry criticism of this statute to the extent to which it was carried by the supreme court of California when it described the words "municipal affairs" as "loose, indefinable, wild words," I do think the expression lacks clearness and definiteness, but this is in all probability due not so much to poverty of expression as it is to the fact that the writer had no very definite knowledge

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upon the subject. The statute appears to be a very fair reflection of such mental condition. However that may be, we must derive the intention of the legislature from the words of the statute. Weighing these words with reference to the subject matter concerning which they were written, I think they will admit of no other reasonable interpretation than that here suggested. If the statute in question attempted to confer upon the city or its electors power or authority to make laws conferring power upon itself or themselves not otherwise conferred, it would also be invalid as in conflict with the sovereignty of the state. I think the proposed amendment to the Milwaukee charter is not within the purview of the statute in question, and if it were the act would also be unconstitutional as a delegation of legislative power to an extent not warranted even by the most liberal interpretation of the constitution.

It follows that the order of the court below should be reversed and the cause remanded with directions to quash the writ.

PHILLIPS, Respondent, vs. HOLLAND and wife, Appellants.

April 23—May 14, 1912.

Mortgages: Assignment: Foreclosure: Previous agreement for extension: Validity.

1. An agreement by which, for a valuable consideration paid by the mortgagor, the time for payment of a note and mortgage is extended, is valid though not in writing.
2. Such agreement is binding upon one to whom the note and mortgage were assigned after the due date of the note but before the extended time had expired, although such assignee was assured by the assignor that the note was then past due.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

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This is an appeal from a judgment of foreclosure and sale, in an action to foreclose a mortgage executed on August 18, 1905, to J. J. Schissler, to secure a promissory note for the sum of $3,500, payable at Schissler's office on November 1, 1908, interest payable semi-annually on the first day of May and November of each year. The mortgage was assigned and the note transferred by indorsement by Schissler on November 2, 1905, and the mortgage was assigned and the note transferred without indorsement by Mrs. Fay E. Lovell, Schissler's assignee, to the plaintiff on September 22, 1910.

For the appellants there was a brief by *Lenicheck, Robinson, Fairchild & Boesel,* and oral argument by *E. T. Fairchild.*

For the respondent there was a brief by *Emil J. Ludwig,* attorney, and *Moritz Wittig,* of counsel, and oral argument by *Mr. Wittig.*

SIEBECKER, J. The defendants claim that a short time before November 1, 1908, when the note became due, it was extended for a valuable consideration for three years, and that this action, which was commenced on December 2, 1910, was brought prematurely. The plaintiff testified that she received the mortgage and note as consideration for real estate sold to Mrs. Lovell by her, and that Mrs. Lovell assured her in the presence of her scrivener that the note had not been extended and that it was due. The scrivener testified to the same effect.

The defendant *Ernst Holland* testified that before November 1, 1908, when the note became due, he was asked by Schissler whether he desired to have the note extended; that upon payment of $17.50 to Schissler he arranged with Schissler to have the time of payment extended for three years; that he paid this amount and received a receipt from Schissler; that he did not know that Schissler no longer held the mortgage and note and that Schissler had theretofore transferred the

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note and mortgage to Mrs. Lovell; and that he did not know that Schissler was acting for Mrs. Lovell in collecting the interest and in extending the time of payment. Mr. Schissler testified that he had the transaction with the defendant; that Mrs. Lovell consented to the extension; and that an entry of the extension had been made by his direction in his books. Mrs. Lovell testified that she knew of and agreed to the extension when Mr. Schissler brought it to her notice, and that she informed the plaintiff thereof before and at the time she formally assigned the note and mortgage to her.

The court found that the time for the payment of the note had not been extended; that the plaintiff had no notice or information of the extension; and that the note was past due when the action was commenced.

It is difficult to perceive upon what evidence in the case the court could come to the conclusion that the time for payment of the note had not been extended for three years from November 1, 1908, the date of the maturity as specified on the face thereof. The evidence is without dispute that the defendant (the mortgagor), the owner of the note (Mrs. Lovell), and her agent (Mr. Schissler) entered into an agreement, by which the time of payment of the note and mortgage was extended for three years and under which the defendant paid as a consideration for this agreement the sum of $17.50 to Mr. Schissler. There being no dispute on this point, the agreement became a verity in the case and the parties thereto are bound thereby. The fact that it was not in writing does not affect its validity. *Grace v. Lynch,* 80 Wis. 166, 49 N. W. 751; *Fisher v. Stevens,* 143 Mo. 181, 44 S. W. 769. True, it appears that the plaintiff and her scrivener testify positively that Mrs. Lovell represented to them at the time of the negotiations and the transfer of the note and mortgage to the plaintiff that the time of payment of the note and mortgage had not been extended and that they were then due. This is denied by Mrs. Lovell in her testimony, and she af-

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firms that the time of payment was extended by her as claimed by the defendant and that she so informed the plaintiff and her scrivener. The trial court manifestly found that the plaintiff was assured by Mrs. Lovell that the note and mortgage were past due when the plaintiff purchased them. This, however, is no evidence to impeach the agreement actually made between the defendant and Mr. Schissler for such an extension of the time of payment and the fact that it was actually assented to by Mrs. Lovell. We are constrained to hold that the trial court's findings on this point are against the undisputed evidence and that shortly before the note became due on November 1, 1908, an agreement was made by the defendant and Mrs. Lovell, for a valuable consideration, extending the time of payment for three years, and that the note was not due and payable until November 1, 1911.

The plaintiff acquired no other rights under the assignment to her than those of her assignor. She was bound by the extension agreement (*Allison v. Manzke,* 118 Wis. 11, 94 N. W. 659), and hence this action was prematurely brought. The court should have so found and have awarded judgment accordingly.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to dismiss the complaint.

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GERRETSON, Administrator, Appellant, vs. RAMBLER GARAGE COMPANY, Respondent.

April 23—May 14, 1912.

Master and servant: Negligence of chauffeur of hired automobile: Injury to occupant: Liability of master: Sunday contracts.

1. A chauffeur employed at a public garage and sent out in charge of a hired car to operate and manage it is, while so engaged, the servant of the keeper of the garage and not of the hirer of the car.
2. If such chauffeur, while acting within the scope of his duty, is guilty of a want of ordinary care in driving the car which results in injury to the occupants, the master is liable.
3. In such case the cause of action is based upon the tort or negligence and not upon the contract of hiring, and it is therefore immaterial whether or not the contract was void because made and performed on Sunday.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action was brought by the plaintiff, as administrator with the will annexed of the estate of Wilhelmina Gerretson, deceased, to recover upon two causes of action; one in favor of the estate of deceased, and the other in favor of the beneficiaries of said deceased under the death statute for the benefit of her children on account of the negligence of the defendant. Damages are claimed in the sum of $5,000 under the first cause of action and in the sum of $3,500 under the second cause of action.

The answer admits that Wilhelmina Gerretson died testate on the 16th day of December, 1909, and the representative capacity of the plaintiff; that deceased was injured at the time and place alleged in the complaint, and that she was a widow; also admits the corporate existence of the defendant, and denies generally, upon information and belief, the other allegations of the complaint.

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The court granted a nonsuit as to the second cause of action, and after the evidence was all in directed a verdict for the defendant. Judgment was entered in favor of the defendant dismissing the complaint, from which this appeal was taken.

The evidence tends to show that during the afternoon of Sunday, November 7, 1909, William F. Gerretson, a son of deceased, called defendant's garage by telephone and ordered a seven-passenger automobile to come to his home on Garfield avenue, in the city of Milwaukee, for a drive about the city, carrying himself, members of his family, and friends. In response to the call one of defendant's seven-passenger forty-five horse power automobiles, driven by defendant's servant, L. D. Cook, went to the home of W. F. Gerretson under instructions from defendant's foreman to drive the machine where directed, and Mr. and Mrs. W. F. Gerretson and Mr. and Mrs. James Donovan there entered the car, Mr. Gerretson directing the chauffeur to drive to 1820 Grand avenue, the home of R. W. Gerretson, another son of deceased. There deceased and her granddaughter entered the car and the chauffeur was directed to drive to the Gerretson store, 107 Wisconsin street, thence to several places on Milwaukee street, and thence to a point on Van Buren street between Knapp street and Juneau avenue. The day was misty and rainy and the sides, top, and glass wind-shield of the automobile were up to protect the occupants. The pavement was wet and slippery and there were tire chains in the car, furnished by defendant to meet the very conditions then presented by wet and slippery pavements. The chauffeur negligently failed to put them on because he "did not want to get his hands and clothes soiled." After leaving the Peacock home on Van Buren street on the return trip to the home of R. W. Gerretson on Grand avenue, the chauffeur selected his own route and drove north on Van Buren street to Knapp street, west on Knapp street to Milwaukee street, and south on Milwaukee street in a straight line five blocks to its intersection with Mason street.

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Going south on Milwaukee street the automobile was driven at a speed of eighteen to twenty miles an hour in violation of the ordinance of the city limiting the speed to twelve miles per hour. When the street car, running west on Mason street, came into view, the speed with which the automobile was driven made a collision between it and the car inevitable, and to minimize its effect the chauffeur turned sharply the corner at Mason and Milwaukee streets, going west. The street car and automobile reached the west line of Milwaukee street at the same time, and the speed of the automobile being so great, its rear wheels skidded on the pavement and the rear end of the automobile collided with the street car at its forward truck, just behind the front platform. The force of the impact was so great as to throw deceased with such violence against the left side of the automobile as to completely fracture five ribs and severely bruise her hip and back. The automobile was held fast to the street car for a few minutes, then freed, and ran down hill on the north side of Mason street about sixty feet. After the release from the street car W. F. Gerretson and James Donovan administered to the two injured ladies, and the wrecked machine was then driven by the chauffeur to the garage, about a block from the place of the accident, and the deceased and Mrs. Donovan were lifted into another automobile and driven by the chauffeur, Cook, to the home of W. F. Gerretson, into which they were carried. From this time until her death deceased suffered great pain, and during that period was confined almost continuously to her bed, being moved with difficulty and never without assistance. From the injuries sustained and the pain and suffering undergone, death ensued December 16, 1909.

It further appears that during the entire period of hiring, Cook, as driver of the automobile, was acting wholly within the scope of his employment and in compliance with the directions of the defendant.

Paul D. Durant, for the appellant.

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For the respondent there was a brief by *Lines, Spooner, Ellis & Quarles,* and oral argument by *F. C. Ellis.*

KERWIN, J. There is ample evidence to entitle the jury to find that the chauffeur so negligently operated the car as to cause the injury in question. But it is insisted by respondent that the directed verdict for defendant and judgment dismissing the complaint should be upheld for the following reasons: (1) that the chauffeur was the servant of W. F. Gerretson, the hirer of the car; (2) that even though the chauffeur was the agent of defendant, still no negligence was shown, because the negligence of the chauffeur was not chargeable to defendant; and (3) that the contract between Gerretson and defendant was void because made on Sunday, therefore no recovery could be had upon it.

1. There is no evidence in the case tending to show that the chauffeur was the servant of deceased or of W. F. Gerretson. The defendant furnished the car with the chauffeur to operate it, and the chauffeur had charge and management of the car. The deceased or W. F. Gerretson exercised no control as to the operation and management of it. The chauffeur, therefore, was the servant of the defendant. *Shepard v. Jacobs,* 204 Mass. 110, 90 N. E. 392; *Little v. Hackett,* 116 U. S. 366, 6 Sup. Ct. 391; *Morris v. Trudo,* 83 Vt. 44, 74 Atl. 387; *Hiroux v. Baum,* 137 Wis. 197, 118 N. W. 533; *Frerker v. Nicholson,* 41 Colo. 12, 92 Pac. 224; *Murray v. Dwight,* 161 N. Y. 301, 55 N. E. 901; *Quarman v. Burnett,* 6 M. & W. 499.

2. The respondent, in support of the judgment below, strenuously insists that the plaintiff cannot recover because the right to recover must be traced through a Sunday contract, and relies mainly upon *Sentinel Co. v. A. D. Meiselbach M. W. Co.* 144 Wis. 224, 128 N. W. 861. In that case the action was brought to recover upon *quantum meruit* for services performed on Sunday, and it was held that no recovery could

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be had because of our statute, sec. 4595, Stats. (1898), which prohibits labor, business, or work, except only works of necessity or charity, on Sunday. It will be seen that in that case the contract upon which the suit was based was in direct violation of the statute, being for Sunday publications, and came clearly within the terms of the statute as "labor, business, or work" and not work of necessity or charity. The right of action in the instant case is not based upon the contract of hiring between W. F. Gerretson and the respondent, even if it should be held that such contract was in violation of the Sunday law, a point we do not decide. It has been held under statutes quite similar to ours that it is not illegal to walk, drive, or exercise on Sunday. *Barker v. Worcester,* 139 Mass. 74, 29 N. E. 474; *Sullivan v. Maine Cent. R. Co.* 82 Me. 196, 19 Atl. 169. Nor to carry home a visitor. *Buck v. Biddeford,* 82 Me. 433, 19 Atl. 912. See, also, *Crosman v. Lynn,* 121 Mass. 301.

But whether the contract of hiring was void or not is not material here, since the plaintiff's right of recovery is based upon the tort of the defendant's servant while acting within the scope of his duty in operating the car. Many cases are cited by both parties from foreign jurisdictions, but the question has been settled by this court in favor of the appellant. *Gabbert v. Hackett,* 135 Wis. 86, 115 N. W. 345; *Sutton v. Wauwatosa,* 29 Wis. 21; *McArthur v. Green Bay & M. C. Co.* 34 Wis. 139, 150; *Knowlton v. Milwaukee City R. Co.* 59 Wis. 278, 18 N. W. 17.

It is argued, however, by respondent that if the contract of hiring were void no duty rested upon the defendant, and that the case should be distinguished from those of common carriers, where the law imposes a duty independent of contract. We think the contention is not only against the decisions of this court but against the great weight of authority elsewhere.

The duty of a common carrier, while in some degree im-

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posed by law, is a duty growing out of contract, and this court held in *Gabbert v. Hackett, supra,* that whether the contract was valid or invalid was immaterial, because it had no causal relation with the injury. In the case at bar the defendant undertook for hire to carry the deceased and others, and in the performance of that duty, through negligence, caused the injury to deceased. The contract of hiring had no causal relation with the injury. The cause of action is based upon the tort or negligence of the defendant. In *McArthur v. Green Bay & M. C. Co., supra,* the court said:

"The same state of facts which would entitle the plaintiff to recover, had the injury happened on any day other than Sunday, will entitle him to recover in this action notwithstanding the injury was received on Sunday, and when he was unlawfully navigating the canal with his boats."

See, also, *Bucher v. Cheshire R. Co.* 125 U. S. 555, 8 Sup. Ct. 974; *Kansas City v. Orr,* 62 Kan. 61, 61 Pac. 397; *Gross v. Miller,* 93 Iowa, 72, 61 N. W. 385, 26 L. R. A. 605; *Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. S. T. Co.* 64 U. S. (23 How.) 209.

3. The evidence being sufficient to warrant the jury in finding that the agent or servant of the defendant was acting within the scope of his duty and that he was guilty of a want of ordinary care which caused the injury, his negligence was the negligence of the defendant. This doctrine is well settled by the decisions of this court. *Schaefer v. Osterbrink,* 67 Wis. 495, 30 N. W. 922; *Bryan v. Adler,* 97 Wis. 124, 127, 72 N. W. 368; *Rogahn v. Moore Mfg. & F. Co.* 79 Wis. 573, 575, 48 N. W. 669; *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304; *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276; *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424; *Hiroux v. Baum,* 137 Wis. 197, 118 N. W. 533; *Steffen v. McNaughton,* 142 Wis. 49, 124 N. W. 1016; *Daley v. C. & N. W. R. Co.* 145 Wis. 249, 129 N. W. 1062.

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The principles of the foregoing cases apply to the instant case. In *Rogahn v. Moore Mfg. & F. Co., supra,* this court said:

"There has been much discussion in the courts as to how far the master is liable for the torts of his servant, and many nice distinctions have been made; but it is generally agreed that for the negligent or wrongful acts of the servant in the line of his duty, for which the master would be liable if the act were done by himself, the master is responsible."

The doctrine is peculiarly applicable to the operation of an automobile. In *Shepard v. Jacobs,* 204 Mass. 110, 90 N. E. 392, where the court had under consideration the question, it is said:

"The management of an automobile properly can be trusted only to a skilled expert. The law will not permit such a vehicle to be run in the streets except by a licensed chauffeur of approved competence. The danger of great loss of property by the owner as well as of injury to the chauffeur, his servant, is such as to make it of the highest importance that care should be exercised in his interest and that the control and management of the machine should not be given up to the hirer."

See, also, *Johnson v. Coey,* 237 Ill. 88, 86 N. E. 678; *Trout v. Watkins L. & U. Co.* 148 Mo. App. 620, 130 S. W. 136; *Routledge v. Rambler A. Co.* (Tex. Civ. App.) 95 S. W. 749; *Morris v. Trudo,* 83 Vt. 44, 74 Atl. 387; *Frerker v. Nicholson,* 41 Colo. 12, 92 Pac. 224.

It follows that the judgment of the court below must be reversed.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

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LEMKE, Administratrix, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

April 23—May 14, 1912.

Appeal: Harmless errors: Prejudice must appear: Special verdict: Sufficiency: Omitted matters: Form of questions: Negligence: Street railways: Injury to traveler on highway: Proximate cause: Instructions to jury.

1. A judgment must be affirmed on appeal unless both error and prejudice to the appellant are made to appear.
2. Where several grounds of negligence are alleged in the complaint, such of them as are not supported by evidence or are not relevant under the evidence as the facts finally appear therein may properly be dropped out of the case and omitted from the special verdict.
3. A special verdict specifically found defendant negligent upon two grounds alleged in the complaint. A similar finding upon a third ground was made in answer to a question which, in the absence of proper instructions, was too general, but no more appropriate question was suggested by defendant. There was also a general finding that defendant was guilty of a want of ordinary care which was the proximate cause of the accident. *Held*, that the last finding refers by fair implication to the two items of negligence specifically and properly found, and, no prejudice to defendant being shown, a judgment for plaintiff should not be reversed because of such informalities in the verdict.
4. In an action for death caused by a collision between an electric car and a buggy, a question in the special verdict, "Was there a proper and sufficient headlight in use on such car at the time of the accident?" was faulty, in the absence of instructions as to the legal test of a proper and sufficient headlight, since the jury might set up a standard of its own in that particular.
5. Two questions in such special verdict, (1) "Was the gong or bell on the car which collided with the buggy sounded within a reasonable time before the accident?" and (2) "Was the car at and just prior to the accident run at an unusually rapid and dangerous rate of speed?" though imperfect, were fairly within the discretion vested in the circuit court with reference to the form of questions to be submitted.

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6. An instruction, in such case, that negligence is the proximate cause of an injury only when that injury is the natural and probable result of such negligence and when in the light of attending circumstances the injury ought to have been foreseen by a person of ordinary care and prudence, is approved.
7. An instruction not incorrect in law, though not applicable to any question submitted to the jury, is not ground for reversal unless it appears that the jury was misled or the appellant prejudiced thereby.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The action is for injuries to Alfred Densow while traveling along the highway in the manner described, by collision of an electric railway car of defendant with the vehicle in which Densow was seated. The charges of negligence are: (a) an unusually dangerous rate of speed of the car; (b) failing to ring any gong or bell or give warning; (c) failing to drop the fender of the car; (d) failing and neglecting to reverse the brakes of the car; (e) failing and neglecting to promptly stop the car; (f) failing to provide a proper and sufficient headlight on the car.

The special verdict was as follows:

"(1) Was plaintiff's intestate, Alfred Densow, killed July 4, 1908, by a collision with one of the defendant's street cars? *A.* (by the court). Yes.

"(2) Was the gong or bell on the car which collided with the buggy sounded within a reasonable time before the accident? *A.* No.

"(3) Was there a proper and sufficient headlight in use on such car at the time of the accident? *A.* No.

"(4) Was the car at and just prior to the accident run at an unusually rapid and dangerous rate of speed? *A.* Yes.

"(5) Was defendant guilty of a want of ordinary care which was the proximate cause of the accident? *A.* Yes.

"(6) Was Guy Brown, the driver of the buggy, guilty of any want of ordinary care which proximately contributed to the injury? *A.* No.

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"(6½) Ought the plaintiff's decedent, Alfred Densow, in the exercise of ordinary care to have discovered the approach of the car in time to have avoided the collision, if he had made diligent use of his senses of sight and hearing? *A.* No.

"(7) If the court should be of the opinion that the plaintiff should recover, at what sum do you assess her damages? *A.* $3,250."

For the appellant there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *James D. Shaw.*

For the respondent there was a brief by *Nohl & Nohl* and *Houghton, Neelen & Houghton,* and oral argument by *F. W. Houghton.*

TIMLIN, J. By questions 2, 3, and 4 of the verdict three of the six grounds of negligence in the complaint are established. The other grounds are not found and were dropped out of the case, apparently because not supported by evidence or relevant under the evidence as the facts finally appeared therein. This is the usual and proper practice. The third question is faulty, especially because the court failed to specify by instructions what are the legal tests of a proper and sufficient headlight. This left the case exposed on this point to the danger of a jury setting up a standard of its own in this particular. But it is not faulty in that the fact covered is irrelevant or nonactionable. The fifth question is very comprehensive and sweeping, but verdicts in this form have been approved (*Halwas v. American G. Co.* 141 Wis. 127, 123 N. W. 789) or the error held nonprejudicial (*Twentieth Century Co. v. Quilling,* 136 Wis. 481, 486, 117 N. W. 1007). The appellant criticises this question on the ground that the jury may have found the defendant guilty of a want of ordinary care which was the proximate cause of the accident in some particular not covered by the complaint or even not actionable. This appears to raise the question whether we must presume error or regularity. We have a situation where at

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least two grounds of negligence averred in the complaint are specifically found, one additional ground submitted in too general words, then a sweeping question covering the defendant's negligence and proximate cause without specifying of what such negligence consisted. The defendant requested the submission of four questions, three of which related to contributory negligence of the plaintiff and one related to the negligence of both plaintiff and defendant and was as follows: "Did the motorman sound his gong before the collision in time to have enabled the plaintiff, in the exercise of ordinary care, to have left the track and thus avoided the collision?" The situation presented is not that presented in *Sladky v. Marinette L. Co.* 107 Wis. 250, 83 N. W. 514. There by the first question of the special verdict the court submitted to the jury a non-issuable fact not charged in the pleadings as a ground of negligence, and by instructions made this cover almost everything that could have been covered by a general verdict. Neither is the situation analogous to that in *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714. In the latter case the defendant requested special findings upon facts put in issue by the pleadings, and the court refused and merely asked the jury whether the defendant's servants in charge were guilty of a want of ordinary care in backing the train at the time of plaintiff's injury. The case last cited and the case of *Bigelow v. Danielson,* 102 Wis. 470, 78 N. W. 599, are explained and distinguished in *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644. There the defendant proposed four questions which were rejected, and all covered by one more general question submitted. In the instant case three charges of negligence contained in the complaint were dropped out by failure of proof, three were retained and specifically found on, one, however, by a question defective in form. A situation arising upon special verdict similar in some respects to that in the instant case is disclosed in the report of *Halwas v. American G. Co.* 141 Wis. 127, 123 N. W. 789.

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Where four separate grounds or acts of negligence are found and four other separate answers declare that each is a proximate cause of the injury, if either of the first four is supported by evidence it is not material whether the others be or not. *Szewczyk v. E. W. Ellis L. Co.* 146 Wis. 452, 131 N. W. 977. Examples of special verdicts upheld where several acts of negligence were found and each found to be a proximate cause of plaintiff's injury: *Fonder v. General C. Co.* 146 Wis. 1, 130 N. W. 884; *Driscoll v. Allis-Chalmers Co.* 144 Wis. 451, 129 N. W. 401. Under the statute of this state which requires the affirmance of judgments by this court except where both error and prejudice to the appellant are made to appear, we cannot disturb the judgment on account of such informalities in the special verdict. While the third question of the special verdict is disapproved as to form, especially when unaccompanied with proper instructions, no more appropriate question was suggested by appellant in its stead, and the facts found by that question may be dropped out of consideration and the question treated as if the jury had answered it in the affirmative, and still there is sufficient in the verdict to support this judgment. For the second and fourth questions itemized certain grounds of negligence, and the general finding of negligence which was the proximate cause of plaintiff's injury in the fifth question must be held to refer by fair implication to the items of negligence found by the second and fourth questions. Any other disposition of this case would be the result of a presumption of prejudicial error in which we cannot indulge. The form of the second and fourth questions submitted is criticised. They cannot be considered models, but they are fairly within the discretion vested in the circuit judge with reference to form of questions submitted. On the whole we must decline to reverse on account of alleged errors in the form of the special verdict under the circumstances here appearing.

The trial court in its instructions defined ordinary care and

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proximate cause, stating, among other things, that negligence is the proximate cause of an injury only when that injury is the natural and probable result of such negligence and when in the light of attending circumstances the injury ought to have been foreseen by a person of ordinary care and prudence. Such instructions have been approved by this court. The jury was further instructed that it was the duty of the defendant to operate its street railway in such manner as not to obstruct or prevent the common public travel of the highway and to provide its cars with suitable fenders or pilots so arranged and constructed as to protect the lives, limbs, and bodies of all persons that may be upon the highway against injury by striking or running over them. This appears to be a sort of a paraphrase of the statute law on the subject. It was not applicable to any question arising upon the evidence or submitted to the jury. It is not incorrect in law, and if it can be made ground for reversal it must be because the jury was thereby misled. It was stated by the trial court as a sort of introduction or prelude to a statement of the duty of those traveling in other vehicles upon the highway. It should not have been given in this case, considering the issues submitted by the special verdict. But we are not satisfied that the jury was misled or that the appellant was prejudiced thereby, consequently it affords no ground for reversal.

We have considered the instructions requested by the appellant. We consider that all matters correctly covered by these requests were also sufficiently covered by the instructions given, at least to such extent that we cannot say that any prejudicial error resulted from the refusal. Under present statutes and rules we cannot find in the record sufficient cause for reversal.

By the Court.—Judgment affirmed.

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INDIANA ROAD MACHINE COMPANY, Respondent, vs. TOWN OF LAKE, Appellant.

April 23—May 14, 1912.

Towns: Powers of town board: Purchase of road machinery: Town orders: Validity: Stipulation: Foreign corporations: Validity of contracts: Interstate commerce.

1. In an action upon a town order for $200 given in part payment for a road roller and two road machines, a stipulation by the parties reciting, among other things, that defendant had tendered $150 in payment of the order, which tender was refused, and that "defendant has been at all times and is now ready to pay for the road machine and the road roller delivered to district No. 26" (representing $150 of the order), was an admission of every fact essential to a valid cause of action, and the town cannot successfully claim that the order was not a legal obligation against it to the extent stated.
2. A contract between the town board of an organized town of this state and a foreign corporation which has not complied with the provisions of sec. 1770*b*, Stats. (Supp. 1906), for the purchase of a rock crusher previously shipped into the state and delivered to the consignee, who was the town chairman, did not involve any transaction of interstate commerce and is void.
3. In such case, a town order issued to the foreign corporation in part payment of the purchase price is also void.
4. A town board has no power, without express statutory authority, to purchase expensive machinery, such as a rock crusher, to be paid for by tax levies after their terms of office expire.
5. Subd. 2, sec. 1223, Stats. (Supp. 1906: Laws of 1899, ch. 83, sec. 1), which authorizes town boards "to purchase machinery, implements, stone," etc., "on such terms as may seem proper," does not confer unlimited power to purchase at their discretion, but, when read in connection with other statutes, means merely that they may so purchase when the electors have made provision to meet the expenditure and have in fact or in effect authorized it.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Modified and affirmed.*

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This action is brought on four town orders. The first cause of action involved an order for $200. The court permitted a recovery on this order to the amount of $150 and interest. The appellant contends that a recovery of only $50 and interest should have been allowed on this cause of action. The order was drawn for three alleged items of indebtedness: (1) a partial payment of $100 on account of a road roller purchased by the chairman of the town from the plaintiff; (2) a partial payment of $50 on a road machine purchased for road district number 26 of the defendant town; and (3) a partial payment of a like amount on the alleged purchase of a like machine for road district number 6 of the town. No complaint is made as to the decision of the circuit court in reference to the last two items. The appellant contends that the first item of $100 should have been disallowed for reasons hereinafter stated. The roller was purchased pursuant to a petition made under sec. 1223*a*, Stats. (Supp. 1906: Laws of 1899, ch. 83, sec. 2). No question is raised as to the sufficiency of the petition. Various defenses to this portion of the order are set up in the answer, but the points relied on to defeat recovery are: (1) the contract of purchase was signed by the chairman of the town instead of by the town board; (2) the roller was ordered shipped to Wisconsin before the contract of purchase was made, and no recovery can be had thereon because of noncompliance with sec. 1770*b*, Stats. (Supp. 1906); and (3) the contract being for the purchase of the machine on credit for a period of time extending beyond the term of the supervisors then in office, it was void. No question is raised in reference to the right of the plaintiff to obtain a partial recovery on the order. Under the contract of purchase it was agreed that the roller should be paid for in five equal annual instalments with interest. The order in suit was drawn to include the first payment of $100.

The second cause of action was based on a town order for $400 given in part payment for a rock crusher purchased by

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the town board of the defendant town on September 23, 1907, for $1,600, to be paid in four annual instalments of $400 each, the first to become due and payable March 1, 1909. The action was brought on the order which first fell due. There was no pretense that this machine was bought by virtue of ch. 83, Laws of 1899, or that any petition had been made to the chairman requesting any such purchase. It further appeared that no action had been taken by the electors authorizing the purchase or levying any tax to pay for the same, and it also appeared that the highway taxes of the town were payable in labor. There was some testimony tending to show that the town officers used the stone crusher two or three days in the fall of 1907. A new town board was elected the following spring, and the defendant attempted to show that thereafter the machine was not used, but the court excluded the testimony. Judgment was awarded for plaintiff on this order. Defendant appeals. The decision of the court on the orders involved in the third and fourth causes of action is not complained of.

For the appellant there was a brief by *Otjen & Otjen,* and oral argument by *H. H. Otjen.*

For the respondent there was a brief by *Friedrich, Teall & Hackbarth,* and oral argument by *F. W. Teall.*

Barnes, J. The contention of the appellant in reference to the allowance of $100 on account of the road roller may be summarily disposed of. Most of the facts in the case were stipulated. The stipulation recited, among other things, that the defendant tendered $150 in payment of the order set out in the first cause of action, which tender was refused, and that "the defendant has been at all times and is now ready to pay for the road machine and the road roller delivered to district No. 26." The stipulation further provided that it should not "prevent either party from introducing evidence at the trial of this action which is not inconsistent herewith." During

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the progress of the trial one of the defendant's attorneys said: "As I understand it, the stipulation governs as to the facts stated in the stipulation." To which statement one of plaintiff's attorneys said "Yes."

We have here a solemn deliberate admission that the defendant was indebted to plaintiff in the sum of $100 on account of the purchase of the roller, and that it was ready and willing to pay the same whenever plaintiff was willing to accept it. The only issue reserved for trial upon the first cause of action related to the sum of $50 included in the order on account of the purchase of a road machine for road district No. 6. On this issue the appellant prevailed. Facts might exist which would authorize the purchase of the roller. It is true that there is no recital of these specific facts in the stipulation, but when the defendant admitted that it was indebted in the sum of $100 on account of the road roller and that plaintiff was entitled to judgment therefor, it necessarily admitted the existence of every fact essential to the establishment of a valid existing cause of action. We think it is clear that the defendant should not now be allowed to successfully claim that so much of the order as was given in part payment for the roller was not a legal obligation against it. *Puffer v. Welch,* 144 Wis. 506, 129 N. W. 525.

The remaining question in the case relates to the validity of the order for $400 given in partial payment for the stone crusher, and on which the second cause of action was based. The plaintiff's Chicago agent ordered this machine to be shipped to Paul Welbes, chairman of the defendant town, on July 30, 1907. This order was made pursuant to directions received prior thereto from the defendant's Milwaukee agent, and while it does not very definitely appear what authority the agent acted on, it may be fairly assumed that the town chairman made some arrangement for the purchase of the machine. The machine was shipped to Milwaukee and was unloaded from the car in which it was shipped at about 9 o'clock on the

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morning of September 23d and was taken to a point on Becher street in the city, where it was used in crushing rock for use on one of the streets in Milwaukee, for the improvement of which Welbes and one Crilly had a contract. On the evening of September 23d the members of the town board and the agent of the plaintiff met in a saloon in the defendant town and made the contract referred to in the statement of facts. This was the first action taken by the town board in reference to buying the stone crusher. None of the members of the board except Welbes knew that the machine was then in Milwaukee, or that Welbes and Crilly intended to use the same, or that Welbes had assumed the authority to order it. The machine was kept in Milwaukee until November 21st following. The extent to which the town used the machine is referred to in the statement of facts. It is admitted that the plaintiff is a foreign corporation and that it never complied with the provisions of sec. 1770*b*, Stats. (Supp. 1906), which among other things provides:

"Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

It would seem to be too plain to admit of argument that no contract for the purchase of this machine was made before the evening of September 23d. Certainly the chairman had no power to make such a contract. It seems just as obvious that this stone crusher was property within this state when the contract for the purchase was made, and that therefore the contract was made in violation of the statute, unless the machine was an article of interstate commerce when the contract was made. We have said that sec. 1770*b* was a drastic statute, but nevertheless one which the legislature had power to enact, and it is the duty of the court to enforce it as to all contracts

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which run counter to its provisions. *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904; *Hanna v. Kelsey R. Co.* 145 Wis. 276, 283, 129 N. W. 1080.

We think it is clear that when this machine was taken from the care and custody of the carrier in Milwaukee and was received by the consignee and removed by him to the place where he intended to use it, it ceased to be an object of interstate commerce. *Brown v. Maryland,* 12 Wheat. 419, 441; *Welton v. Missouri,* 91 U. S. 275; *Emert v. Missouri,* 156 U. S. 296, 15 Sup. Ct. 367; *Hynes v. Briggs,* 41 Fed. 468; *Kehrer v. Stewart,* 197 U. S. 60, 25 Sup. Ct. 403. It is inferentially decided in *Greek-American S. Co. v. Richardson D. Co.* 124 Wis. 469, 102 N. W. 888, that where property is sold after it has reached its destination and has been delivered to the consignee, it is no longer a subject of interstate commerce. The plaintiff had delivered the machine at its destination and had parted with the possession of it, and the consignee, Mr. Welbes, had taken possession thereof, and it belonged to either Welbes or the plaintiff when the contract of purchase was made. This contract was void under the statute cited, and, being void, the town order issued in part payment of the purchase price was also void.

For another reason we think that no recovery can be had on this order. The electors never authorized the purchase of this rock crusher. The taxpayers never petitioned that it be purchased, and they had no authority to do so under the statute. Sec. 1223*a*, Stats. (Supp. 1906: Laws of 1899, ch. 83, sec. 2). No levy was ever made to provide for the whole or any part of the purchase price. That a town board has no power to incur an expenditure of this character to be paid by tax levies to be made after their terms of office expire, unless authorized to do so by statute, was held in *Beyer v. Crandon,* 98 Wis. 306, 73 N. W. 771, and is elementary law. Whatever authority the board had is referable to subd. 2 of sec. 1223, Stats. (Supp. 1906: Laws of 1899, ch. 83, sec. 1), which

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authorizes town boards "to purchase machinery, implements, stone, gravel and other material on such terms as may seem proper." We do not think that this very general language gives the board a *carte blanche* to buy what it pleases and agree to pay therefor when it sees fit. This statute must be read in connection with other statutory provisions, and when so read it means that such power may be exercised when the electors have made provision to meet the expenditure and have in fact or in effect authorized it. Sec. 823, Stats., as amended by ch. 264, Laws of 1907, provides that no town order shall be issued until the tax for the payment of such order shall have been voted by the electors, and that no town board shall authorize the issue of any order in a sum exceeding the amount which the town is authorized to appropriate for the purpose for which the order is issued. The law further provides that each order drawn shall state the purpose for which it was drawn, the fund against which it is drawn, the amount appropriated to such fund, and the amount remaining therein in excess of the amount of the orders drawn against the same. This statute, as well as others that might be enumerated, aims to place towns on substantially a cash basis and to prevent the incurring of any indebtedness or the expenditure of any money within any one year in excess of the amount of money levied by the electors for such purpose. Provision is made for the making of certain emergency expenditures by the board and for incurring indebtedness extending over a series of years in certain cases, but the rock crusher was not and could not have been purchased under any of these provisions. We hold that the power to purchase machinery "on such terms as may seem proper" did not authorize the purchase here made.

By the Court.—The judgment is modified by striking therefrom the sum of $497.27, being the amount of said $400 order with interest thereon included in said judgment, and as so modified the judgment is affirmed. The appellant is allowed costs in this court.

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MUELLER, Appellant, vs. RICE and others, Respondents.

April 23—May 14, 1912.

Justices' courts: Appeal: When taken: Unlawful detainer: Undertaking to stay execution: Breach: Failure to appeal: Recitals: Estoppel.

1. An appeal from justice's court is not taken until both a notice of appeal and an affidavit of good faith are presented to the justice as required by sec. 3754, Stats. (1898).
2. Where the defendant in an action of unlawful detainer gave notice of appeal from a judgment of restitution and an undertaking to stay execution under sec. 3368, Stats. (1898), conditioned to pay the *costs of the appeal* and the rent and other damages accruing *during the appeal*, but did not perfect the appeal by filing any affidavit of good faith, such conditions of the undertaking never became operative and hence could not be breached.
3. Although such undertaking recited that an appeal had been taken, and upon the filing thereof a writ of assistance, which had been issued, was returned unexecuted and defendant remained in possession of the premises for two weeks or more before she was put out on a second writ, those who executed the undertaking were not estopped from claiming that no appeal had in fact been taken.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Paul D. Durant, for the appellant.

For the respondents *Rice* and *Fellows* there was a brief by *Kanneberg, Cochems & Wolfe,* and oral argument by *H. O. Wolfe.*

For the respondent *Hadden* there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *H. L. Gold.*

WINSLOW, C. J. The plaintiff having obtained judgment against the respondent *Alice B. Fellows* of restitution of certain premises in an action of unlawful detainer before a justice of the peace, said respondent *Fellows* gave notice of appeal from the judgment, and also gave an undertaking to stay

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execution under sec. 3368, Stats. (1898). This undertaking was signed by herself as principal, and by the respondents *Rice* and *Hadden* as sureties, and was conditioned that the principal would "pay all costs of such appeal which may be awarded against her and abide the order of the court therein, and pay all rent and other damages accruing to the plaintiff during the pendency of such appeal." The appeal never was perfected by the filing of an affidavit of good faith, as required by secs. 3368 and 3754, Stats. (1898). Upon the filing of the undertaking a writ of assistance which had been issued was returned unexecuted, and the respondent *Fellows* remained in possession of the premises for a little more than two weeks, when she was put out by a second writ of restitution, and this action was brought upon the undertaking by the plaintiff to recover costs and damages sustained by her by reason of the defendant having remained in possession of the premises.

At the close of the plaintiff's evidence a verdict for the defendants was directed on the ground that no appeal ever was taken in the unlawful detainer action. This direction was unquestionably correct. The appeal is not taken until both the notice of appeal and the affidavit of good faith are presented to the justice. Hence no appeal was ever taken in the present case. *Knappe v. Seyler,* 87 Wis. 165, 58 N. W. 248. The undertaking was conditioned to pay the costs *of the appeal,* and the rent and other damages accruing *"during the appeal."* The conditions of the undertaking, by their express terms, only became operative in case an appeal was taken, consequently they never have been breached.

It is argued that the defendants are estopped from claiming that no appeal has in fact been taken because the undertaking recites that the same has been taken. On this proposition the cases of *Clark v. Miles,* 2 Pin. 432; *Love v. Rockwell,* 1 Wis. 382; *Billingsley v. Harris,* 79 Wis. 103, 48 N. W. 108; *Zechman v. Haak,* 85 Wis. 656, 56 N. W. 158; *Wilkinson v. United*

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States F. & G. Co. 119 Wis. 226, 96 N. W. 560; and *Stevenson v. Morgan,* 67 Neb. 207, 93 N. W. 180, are relied on. The principle of all of these cases is that where by virtue of the giving of a bond or undertaking the party has secured and enjoyed the delay or other benefit to be secured only by the giving of a valid bond, he is estopped to deny the recitals of the bond to the effect that the appeal was in fact taken, or the provisional remedy issued, or the contingency existed which was the necessary precedent to the giving of the bond.

In the present case there is no such situation. The statute gave the plaintiff ten days within which to take the appeal and file the bond. She might file the bond the first day and take the appeal the last day of the ten if she chose, or she might file the bond and never take the appeal, as she did in this case. In either case she was acting within her right. When the ten-day period had expired all parties understood that there was no appeal. The justice made no return, and the plaintiff caused a writ of restitution to be at once issued. The advantage or delay which would have resulted from a valid appeal was never secured, hence there is no room for the application of the doctrine of estoppel laid down in the cases cited. Whether the statute does not furnish a means of sharp practice by which a party may give a bond and then never take an appeal, and thus secure a ten-day delay which he ought not to have, and for which he gives no security, is a question addressed rather to the legislature than to the court.

By the Court.—Judgment affirmed.

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STATE EX REL. SCHULTZ vs. HALSEY, Circuit Judge.

April 23—May 14, 1912.

Appeal: Inability to furnish undertaking: Certificate of trial judge: Review: Supreme court: Superintending control of inferior courts: Mandamus.

1. Sec. 3052*m*, Stats. (Laws of 1909, ch. 429), providing that an undertaking for costs on appeal "shall not be required if the judge . . . shall certify . . . that the party . . . is unable to furnish such bond or undertaking," leaves to the circuit judge the determination of a question of fact; and where the evidence is conflicting or the inferences of fact therefrom doubtful his conclusions will, on appeal, be treated with the same respect as findings of fact in the trial of cases.
2. The trial judge, in such case, is not required to make the certificate merely upon the affidavits of the applicant, but may take into consideration the man's character, the extent of his acquaintance, and his probable ability to secure bondsmen.
3. In order to justify the exercise of the superintending control of the supreme court, the duty of the inferior court must be plain, its refusal to proceed in the performance of that duty clear, the results of such refusal prejudicial, the remedy by appeal or writ of error utterly inadequate, and the application to the supreme court for relief prompt.
4. Where an application for a certificate that a party is unable to furnish an undertaking for costs, as provided in sec. 3052*m* (Laws of 1909, ch. 429), was made upon affidavits to the effect that he earned from $750 to $900 a year, that his entire income was consumed in the support of his family, that he had practically no property and no accumulated earnings, that he was unable to furnish any undertaking for costs to the amount of $250, and that he had no friend or relative who could or would act as surety for him, and there were counter affidavits, the duty of the trial judge was not so plain as matter of law as to justify issuing a writ of *mandamus* compelling him to issue such certificate.

MANDAMUS. The alternative writ was issued out of this court on April 3, and on the return thereto the cause was argued on April 23, 1912.

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H. B. Walmsley, for the relator.

For the respondent there was a brief by *Doe & Ballhorn*, and oral argument by *J. B. Doe*.

PER CURIAM. *Mandamus* out of this court to compel the defendant, as circuit judge of Milwaukee county, to certify that the relator is unable to furnish an undertaking upon appeal from a judgment of the circuit court for said county. It appears by the petition and the return to the alternative writ that the relator brought action in said court against several defendants and that a verdict for defendants was directed and judgment of dismissal entered thereon December 14, 1911. Thereafter the relator made three applications to the circuit court based upon affidavits for a certificate, under sec. 3052*m*, Stats. (Laws of 1909, ch. 429), to the effect that he was unable to furnish an undertaking for costs in order that he might appeal without bond or undertaking under the provisions of said section. The applications were opposed by counter affidavits.

It appeared in substance from the various affidavits that the plaintiff was steadily employed by the Pfister & Vogel Leather Company and earned about $15 a week at the time the applications were made, which at the present time has been increased to the sum of $18 a week; that he has a wife and four children under eleven years of age, owns personal property in the shape of household furniture not exceeding $150 in value, has no accumulated earnings, and pays $9 per month rent for a house. He states in his affidavit that it takes all of his earnings to support his family and that he has no friend or relative who can and will sign the undertaking as surety for him. An affidavit by an insurance agent of Milwaukee was to the effect that no surety company would furnish the bond to a person circumstanced as relator was, unless the sum of $250 in cash were deposited in addition to the fee.

The circuit judge declined to make the certificate because,

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as he states in his return, he was not convinced that the relator was "unable to furnish an undertaking for costs upon the appeal."

The statute above referred to provides that the undertaking for costs upon an appeal "shall not be required if the judge . . . shall certify . . . that the party . . . is unable to furnish such bond or undertaking."

This evidently leaves to the circuit judge the determination of a question of fact. Had it been the purpose of the legislature to provide that every person whose entire weekly earnings were used up in the support of his family might appeal without undertaking, it would have been easy as well as natural to provide for the filing of an affidavit to that effect which should operate *ipso facto* in place of an undertaking. The legislature, however, did not choose so to do; they provided that the trial judge must certify to the inability. Of course the certificate must be based on evidence, and where the evidence is conflicting or the inferences of fact therefrom are doubtful this court obviously must treat his conclusions with the same respect that it treats findings of fact in the trial of cases.

It certainly cannot be said as matter of law that every man who is earning from $750 to $900 a year at a steady employment who swears that his entire income is consumed in the support of his family is unable to furnish any undertaking for costs to the amount of $250. If such a man is industrious and has shown himself worthy of confidence he would ordinarily have little difficulty in procuring sureties upon an undertaking of that amount. The circuit judge heard the main case tried and doubtless had better opportunities to judge of the character of the man, the extent of his acquaintance, and his probable ability to secure bondsmen if he made the necessary effort, than we can possibly have. We think the judge was entitled to take such information into consideration and was not required to make the certificate simply because the re-

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lator made oath that all his earnings were required for the support of his family and that he could not secure sureties.

This is an application for the exercise of the power of superintending control. In order to justify the exercise of that extraordinary jurisdiction the duty of the lower court must be plain, its refusal to proceed in the performance of that duty clear, the results of such refusal prejudicial, the remedy by appeal or writ of error utterly inadequate, and the application for relief by *mandamus* prompt. *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081. In the present case it cannot be said that the duty of the trial judge to grant the certificate was in any respect plain.

By the Court.—The alternative writ of *mandamus* is quashed and the proceedings dismissed without costs.

YANIKE, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

April 24—May 14, 1912.

Master and servant: Injury from defective machinery: Evidence: Credibility: Questions for jury: Negligence: Liability: Reasonable anticipation of injury: Contributory negligence: Assumption of risk: Instructions to jury: Special verdict: Order of proof: Appeal: Harmless errors.

1. In an action for personal injuries, plaintiff's testimony that as he was stooping near the fly-wheel of an engine to fill a grease box the governor belt broke and flew up, striking him on the side of the head, rendering him unconscious, and causing him to fall and sustain the injuries complained of, was not rendered wholly incredible by his general statement, soon after the accident, that he did not know how he got hurt and that he guessed the fly-wheel must have caught him, nor by proof that the belt was traveling not more than 370 feet per minute, that plaintiff was found lying upon the floor on one side of the engine and the belt on the other, that the belt had so deteri-

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orated as to have little elasticity or tensile strength, and that plaintiff's injuries were of such a character as to indicate that they were inflicted by the working parts of the engine. The question whether plaintiff was so struck and felled by the belt was therefore one for the jury.

2. To render a person liable for the consequences of a negligent act it is not necessary that such consequences should have been specifically contemplated by him; it is sufficient that they are within the field of reasonable anticipation.
3. In the circumstances stated, the question whether or not an injury was reasonably to be anticipated from the defective condition of the belt was for the jury; as were also the questions of plaintiff's assumption of the risk and contributory negligence.
4. Where an instruction given in connection with a question of the special verdict relating to contributory negligence submits as an element thereof the inquiry whether plaintiff knew and appreciated the danger, the question of assumption of the risk must be held to have been resolved by the jury in accordance with their answer to the question concerning contributory negligence, and the refusal to submit a separate question as to assumption of risk was not a prejudicial error.
5. The reception of evidence in rebuttal which should properly have been a part of the plaintiff's case in chief is not ground for reversal where defendant was not prejudiced thereby.

MARSHALL, J., dissents.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries received by the plaintiff while employed by the defendant as fireman at the roundhouse, machine, blacksmith, and repair shops of the defendant in Milwaukee. It was plaintiff's duty to oil or grease and to start and stop an engine to supply power in the various buildings. The complaint alleges negligence on the part of the defendant in not furnishing the plaintiff a safe place to work, in not warning him of the dangers of his employment about the engine, in furnishing an engine which was defective, and particularly in furnishing a defective, decayed, and wornout belt, which was used to run the governor on the engine and which ran on a pulley on a shaft with the

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fly-wheel and on a pulley attached to a shaft connected with the governor. The answer denied these negligences and alleged that the plaintiff was negligent and assumed the hazards and dangers that caused his injuries.

The plaintiff testified that on the morning of January 3, 1910, he came from the boiler into the room where the engine stood, lifted a bar in the fence guarding the engine, the shafting, and the attached eccentric, drive pulleys, fly-wheel, and belts, and bent down to lift the cover from a grease cup between the pulley on which the large belt ran which transmitted power to the main shaft, and the pulley on which the belt ran which was connected with the governor; that the belt operating the governor broke, whipped up, and struck him on the right side of the head with such force as to render him unconscious; and that he fell down and received the injuries complained of.

The theory of the defense was that the plaintiff was caught in the pulleys or moving parts of the engine and thus injured.

There was medical evidence that the plaintiff had an injury on the right side of the head; that an operation was performed upon him because of it; that the right shoulder was severely bruised; that the elbow and wrist of the right arm were injured; that several ribs were broken; and that he had nerve and brain troubles as a result.

There was evidence that the belt which plaintiff claims struck him traveled between 360 and 370 feet per minute, and that if the belt were to break while going at that rate it would not fly up, but would simply drop to the floor. There was evidence also that the belt was found lying on one side of the engine and that the plaintiff was found lying on the other side, where he could not have been reached by the belt. There was evidence on these questions, in behalf of the plaintiff, to the effect that the engine had pounded frequently; that such pounding came from the drive shaft and might have resulted in a jerking upon the belt which would tend to cause it to break suddenly and cause it to fly violently up and out from the

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point of breakage; and there was evidence that one end of the belt lay near the plaintiff's head when he was discovered.

There was no positive evidence as to how the injuries suffered by the plaintiff, other than the one upon the head, were received, for there were no eye-witnesses of the accident. The circumstances all corroborate the inference that they were inflicted by the moving or revolving parts of the engine, either by the plaintiff having been caught and drawn against the moving parts of the machine or by his falling upon them.

The jury returned the following verdict:

"(1) Was the plaintiff injured on January 3, 1910, while in defendant's employ and at defendant's roundhouse? *A.* (by the court). Yes.

"(2) Was the plaintiff struck on the head by a part of the governor belt attached to the stationary engine in defendant's roundhouse? *A.* Yes.

"(3) Did the defendant negligently fail to provide a safe, proper, and suitable governor belt for said stationary engine? *A.* Yes.

"(4) If you answer the second and third questions each 'Yes,' then answer this question: Was such failure of the defendant to provide a proper, safe, and suitable governor belt for said stationary engine the proximate cause of plaintiff's injuries? *A.* Yes.

"(5) Was the plaintiff guilty of any want of ordinary care which proximately contributed to his injuries? *A.* No.

"(6) If the court should be of the opinion that plaintiff should recover, at what sum do you assess his damages? *A.* $3,500."

This is an appeal from a judgment on the verdict.

For the appellant there was a brief by *William G. Wheeler,* attorney, and *Edward M. Smart,* of counsel, and oral argument by *Mr. Smart.*

For the respondent there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *W. L. Gold.*

SIEBECKER, J. It is contended that the evidence is without dispute in support of the ultimate fact that the plaintiff's in-

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juries resulted from having his arm caught in the drive wheel and drive belt; that this caused him to be thrown onto the moving parts of the engine connected with the driving shaft; and that he struck these parts in a way that caused the injuries complained of. This claim entirely ignores the plaintiff's evidence. He testified that he approached the machinery at the drive wheel of the engine by lifting the guard; that he took a position near the machinery in order to take off the cover of a grease box to fill it with grease; and that, while in a stooping posture and about to take hold of the cover of the grease box located between the drive wheel and the pulley carrying the governor belt, the belt broke and struck him on the head, causing him to fall and receive his injuries. He had no further recollection of what took place and did not know in what manner the various injuries he then received were inflicted.

1. It is argued that his statement that the governor belt thus caused him these injuries is rendered wholly incredible by the following facts: When first he was asked, after the injury, how he got hurt, he stated he did not know and that he guessed the fly-wheel caught him; the position in which the body was found; the nature of his injuries; the facts and circumstances showing that the governor belt could not have struck him as he testified. As to the weight of this alleged former statement, it is manifest that the plaintiff did not undertake thereby to give in a detailed manner what occurred at the time, but he merely stated generally, in reply to questions put to him a few days after the injury, that he guessed the fly-wheel caught him. It is apparent from the context of the statement that the plaintiff was not attempting to give a detailed account of what occurred and what caused him to be injured. It is quite probable that when he fell as he testified, this caused him to come into contact with the drive belt or the fly-wheel, and he stated his conclusion during this interview. Nor does the position of his body on the floor after the in-

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juries, or the nature of his injuries, necessarily refute his statement that he was struck by the broken belt in the manner he testifies. The jury may well have found that, after being stunned by the blow of the belt, he fell upon the moving parts of the machinery before him and that he was struck thereby, and that this produced the different injuries he sustained and caused him to fall onto the floor into the position in which he was found. The nature of his injuries and the position of his body on the floor could well be produced by coming in contact with the moving wheels and the pitman after he was stunned by a blow and caused to fall onto these moving parts of the machinery. The evidence on these points clearly raised an issue of fact for determination by the jury and the court properly submitted it to them for a decision.

2. It is further contended that it is a physical impossibility that a belt of the size of this governor belt, running at the rate of speed it did and under the tension to which it was subjected, could, when it broke, whip over and fly with sufficient force toward the plaintiff to strike him as he testified it did. That the belt broke is not disputed. It is, however, averred that it appears that the material of the belt had so deteriorated from excessive absorption of machine oil that it had little if any elasticity or tensile strength and required but little force to break it, and hence, under well known physical laws, the broken end could not have whipped over or flown toward the plaintiff and have imparted a blow on his head sufficiently heavy to cause him to be stunned and to fall. Counsel's argument on this point assumes these conditions as matter of common knowledge in the light of the facts and circumstances shown by the evidence. There are, however, insurmountable obstacles to such an assumption. The plaintiff's evidence is positively and clearly to the effect that the end of the belt whipped up and flew toward him and that it struck him with such force that it stunned and felled him. Furthermore, the inference from the evidence of some of the witnesses who had

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expert knowledge on the subject corroborates the plaintiff's evidence and is to the effect that such a result was probable under the conditions here presented. Another claim is that the belt could not have so struck the plaintiff because the evidence shows that it dropped into the space between the pulley on the shaft on which it ran and the pulley near the governor. True, some of the witnesses so locate the belt after the accident, but this is controverted by the plaintiff and by inferences from facts stated by others. Nor does it conclusively follow from such location of it that it did not whip or fly up and strike the plaintiff as he claims. These varying facts and justifiable inferences required that this question be submitted to the jury.

3. It is strenuously asserted that the facts wholly fail to show that the defendant could reasonably have contemplated that any injury would probably be caused to some person by this defective belt. If the facts and circumstances are such that the consequences attributable to the negligence charged are within the field of reasonable anticipation, then the party guilty thereof is liable, though they may not have been specifically contemplated by him. *Morey v. Lake Superior T. & T. Co.* 125 Wis. 148, 103 N. W. 271, and cases there cited. The argument upon this point rests largely on the contention advanced by the appellant to support the claims respecting the facts involved in the foregoing question, to the effect that it was wholly improbable that a break in this belt, in the light of the conditions and the uses and functions to which it was applied, would cause an injury to any person. Viewing the situation as we have indicated, the question arises: Are the injuries found by the verdict as resulting from the defendant's negligence of such an unusual and extraordinary character as to place them outside of the ordinary experiences of life and hence not to be anticipated by a person of ordinary intelligence and prudence? It does not so impress us. The fact that a defective belt may, when in operation, break and impart a dangerous blow to an operative near it, is not such an

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extraordinary event as to remove it beyond the field of foreseeable dangers. The circumstances and conditions here presented are not so explicit and clear in this regard as to remove the inference reasonably flowing therefrom and to take the inquiry out of the field and function of the jury. We are of the opinion that the question of whether or not an injury was reasonably to be anticipated from such negligence was a jury question and that it was properly submitted to them.

4. It is also contended that if the belt is to be considered a defective one and that its breaking was the proximate cause of the plaintiff's injuries, then, under the facts and circumstances shown, the plaintiff assumed the risk and was guilty of contributory negligence in attempting to put grease into the cups while the machine was in operation. This claim is predicated on the grounds that the plaintiff was an experienced operator of this machine, had full opportunity to know the condition of the belt and the dangers incident to its breaking, and that he had no occasion to put grease in the cup during the hours the engine and drive shaft with the attachments and belts were in motion. Though there is testimony that this service was commonly performed before starting the engine in the morning and during the noon hour, yet it is a matter of inference as to whether or not it was necessary and proper to put grease into these cups during the hours the machinery was in operation. Nor can it be said, as matter of law, that the plaintiff knew or should have known of the defective condition of the belt. Indeed, the evidence of witnesses experienced in such matters presents serious conflicts as to the external evidence of its defective condition. The undisputed inferences from the whole evidence on these questions is not so clear that we can say as matter of law that the plaintiff's conduct, *per se,* establishes that he was negligent or that he assumed the risk.

In connection with the fifth question the court instructed the jury to the effect that if the plaintiff "ought, in the exercise of ordinary care, to have known and appreciated the

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danger attending his employment around and near the belt in question, he would be held to have understood and appreciated such danger, and to be thereby guilty of a want of such ordinary care as is meant in this question." This required the jury to determine whether or not the plaintiff was negligent in taking the position he did to put grease in the cup, in view of the condition of the governor belt as embraced in the defendant's requested question pertaining to the assumption of risk, and hence must be held to have been resolved by the jury in accordance with their answer to the question concerning contributory negligence. *Bucher v. Wis. Cent. R. Co.* 139 Wis. 597, 120 N. W. 518.

We find no reversible error in the admission of the evidence of the witness Gether. He showed himself to be sufficiently informed on the subject to qualify as an expert. The fact that his evidence was received as rebuttal did not operate to the defendant's prejudice and does not warrant the conclusion that it substantially affected the defendant's rights.

We find no reversible error in the record.

By the Court.—Judgment affirmed.

MARSHALL, J. (*dissenting*). The case, it seems, is governed in favor of appellant by well established rules of law which have either been overlooked, or, for the time, not appreciated. It is a criticism on the administration of the law in this field, not wholly unwarranted, that it goes in such seemingly uncertain and irregular lines as to give rise to an impression that cases turn upon elastic rules of arbitration rather than definite and unbending rules of law.

No one saw the belt strike respondent unless he did. He became insensible the instant the accident occurred and did not regain consciousness for a considerable length of time. The nature of his injury indicates that it could not have been caused, directly, by a blow from the belt, but was caused by the fall and movements of machinery at that moment. He

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said the belt struck him, but all circumstances indicate that he could not have known whether it did or not. Moreover, he stated twenty-four days after the accident occurred, when he was in full possession of his faculties and under conditions quite as favorable for remembering, and much more favorable for telling the truth, than at the trial, that he did not know how he got hurt, that he guessed the fly-wheel caught him, but did not know how it occurred. Furthermore, the belt was a small, very slow-running affair, doing but very little work, and such as was not likely to do otherwise than fall upon coming apart. No witness, called as an expert, pretended that such a belt under such circumstances as existed, would, in any reasonable probability, fly outward a considerable distance from the line of tension, upon coming apart, or even fly outward at all. The natural course of the belt, if it flew at all, was at an angle downward, which could not have reached plaintiff's person above the hips. The location of the broken belt and respondent's person after the accident, repels the idea that the belt caused the fall. In such circumstances, how can it be said the evidence warranted a finding to a reasonable certainty that the belt did the mischief? Looking at the matter in the very best light the evidence will bear in respondent's favor, is it not clear that what caused respondent's fall is involved in the obscurity of mere conjecture? Such is clearly the case in my judgment.

In the light of the foregoing, the case, I think, should be ruled by the well established doctrine that unless the plaintiff produces evidence of sufficient probative power to remove, in his favor, the cause of his injury from the realms of conjecture, he cannot recover. *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Clark v. Franklin F. Mut. F. Ins. Co.* 111 Wis. 65, 86 N. W. 549; *Stock v. Kern,* 142 Wis. 219, 125 N. W. 447; *Hart v. Neillsville,* 141 Wis. 3, 15, 123 N. W. 125; *Bakalars v. Continental C. Co.* 141 Wis. 43, 122 N. W. 721.

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The cases cited and many more show how elementary the law is and how often it has been applied, that he upon whom the burden of proof rests, in a case like this, must go further than to merely show a possibility of the accident having been caused by actionable fault, or that it may or may not have been so caused—the evidence being as strongly on one side as the other, or merely giving rise to a conjecture that it may have been so caused. Any number of possibilities, as it is said, will not make one probability. A verdict can only rightly rest on the latter. Substitution of mere possibility for probability and supposition for facts and evidence of facts, and so reaching a conclusion to compensate an injured one at the expense of another, is a wrongful taking of the property of the latter and bestowal of it upon another.

There is another rule of law quite as firmly established as the one above adverted to and quite as fatal to the recovery complained of, which arises on the following state of the case: The respondent was a man of age, discretion, and large experience with machinery, particularly with the precise situation. The belt was a very small, simple contrivance. It was so located and used that it was under his observation, necessarily, many times each day,—times when it was idle as well as when it was at work. According to his testimony, he had known for a considerable length of time that it was weak. It had broken once before to his knowledge. Every circumstance bearing on the question shows that respondent had a far better opportunity to know the condition of it than any one representing appellant. In that situation why should not the well known rule apply that where the employee has the same or better facilities than the master for knowing the condition of his working place, tools, or appliances, imperiling his personal safety, he is guilty of fatal contributory negligence in not taking note thereof and acting in his own protection, and of fatal assumption of the risk if he does know of the situation and nevertheless subjects himself to it.

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There is a third reason why I think the verdict is without substantial support. If there is a scintilla of evidence to show, appellant ought to have anticipated that the governor belt was liable to break and cause a personal injury to some one, I have not been able to find it. No claim was made that the belt was so located as to be dangerous to employees in the performance of their duties, so it needed guarding under the statute on the subject. No claim was made that the flying of such a belt, even if it parted in operation, was an event reasonably to be apprehended. The only excuse I can see for the jury finding to the contrary is in the implied suggestion by the court that there was credible evidence in respondent's favor on the subject, involved in submitting the matter to the jury. Really, the error on all three points discussed, if error there be, is attributable to the court rather than to the jury. Whether justice or injustice prevails in such cases depends mainly on the court. Notwithstanding the evidence may clearly warrant the direction of a verdict on one side, if the court refuses to grapple with the situation and do so, the jury will naturally take that as a judicial determination that the evidence will support a verdict either way. So it is not good administration to temporarily abdicate judicial duty to direct a verdict with the thought of taking the judgment of the jury and then dealing with the matter from an original standpoint, as is sometimes the case. I venture to say that, had a verdict been directed here on either of the points I have discussed, it would have stood the test of an appeal to this court.

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DI BENEDETTO, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

April 24—May 14, 1912.

Street railways: Wrongful ejection of passenger: Special verdict: Inconsistency: New trial: Evidence: Credibility of witnesses: Questions for jury: Punitory damages.

1. In an action for the wrongful ejection of a passenger from a street car, a finding of the special verdict that plaintiff's conduct was not such as to justify the conductor in ejecting him is not inconsistent with a finding that he was not ejected under circumstances of aggravation or cruelty, with vindictiveness or malice; hence there is no such conflict in the verdict as requires a new trial.
2. The evidence being conflicting, the jury were not bound to believe the statements of either of the participants in their entirety.
3. The allowance of punitory damages is never a matter of right but, even where the proper elements are found to exist, rests in the sound discretion of the jury.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

The plaintiff seeks to recover compensatory and punitory damages by reason of having been violently and maliciously ejected by the conductor from a street car belonging to the defendant. The answer is a general denial.

The testimony of the plaintiff, in which he was corroborated, was that the car he wished to take did not stop at the corner and he was compelled to walk a number of steps to board it; that the conductor said to him, "Get on, Ginney, why don't you get the car on the corner?" that he replied that the car was not on the corner; that when the conductor asked him for his fare, he asked the conductor to wait a minute because he had his overalls and heavy coat on and the conductor said,

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"You God damn Ginney, go on, I can't wait for you;" that he gave the conductor a quarter and received back five tickets, and then said to the conductor, "So your father could not learn you to talk a little better, a man like you;" that the conductor then said, "Shut up, you Ginney, I will throw you out of the car;" that the conductor grabbed him from the back and pushed him out; that he held onto the car with his hand and that the conductor fell off with him and on top of him; that the conductor went to the front of the car, got the switch hook, and came back with it raised in a threatening manner; that the conductor refused to allow him to get back on the car; and that the conductor at first refused to meet his demand for a return of his ticket, on the ground that he had punched it, but that when another conductor advised him to give back a ticket the conductor did so. The plaintiff also testified as to his bodily injuries, the amount of his doctor and medicine bills, his weekly earnings, and the time he was out of work because of his injuries.

The conductor testified that the plaintiff gave him less than a half ticket for his fare; that he demanded another ticket or a nickel and reached for the bell cord to stop the car to put the plaintiff off; that the plaintiff drew a knife from his pocket and raised it to strike him; that he grabbed the plaintiff's wrist and they got off of the car together; that the plaintiff chased him toward the front of the car, where the motorman handed him the switch hook; that he did not strike the plaintiff, but told him he could not come back on the car; and that he gave the plaintiff a ticket when advised by another conductor so to do. He also testified that he did not report the trouble at the company's office.

Other witnesses for the defendant testified that the plaintiff had something eight or nine inches long in his hand, but that they could not distinguish what it was; that the conductor appeared frightened; and that the conductor held the switch

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hook aloft ready to strike the plaintiff on returning from the front of the car and desisted when a passenger called to him not to strike the plaintiff.

The jury returned the following special verdict:

"(1) Did the conductor of the defendant company eject the plaintiff from a car on January 31, 1911, on East Water street, in the city of Milwaukee? *A.* Yes.

"(2) If you answer the first question 'Yes,' then answer this question: Was the conduct of the plaintiff such as to justify the conductor in ejecting him from the car? *A.* No.

"(3) If you answer question 2 'No,' you need not answer question 3. If you answer question 2 'Yes,' then answer this question: Did the conductor use any more force than was reasonably necessary to use in ejecting the plaintiff? *A.* ——.

"(4) If you answer question 2 'No,' then answer the following question: Was the plaintiff ejected from the car under circumstances of aggravation or cruelty with vindictiveness or malice? *A.* No.

"(5) If you answer question 4 'Yes,' then answer this question: Did the defendant ratify the act of the conductor? *A.* ——.

"(6) If you answer question 1 'Yes,' then answer this: Was the conductor, at the time he ejected the plaintiff from the car, in the performance of his duties as a conductor for the defendant company? *A.* Yes.

"(7) If the court should be of the opinion that the plaintiff is entitled to recover damages, in what sum do you assess such damages?

Compensatory $69.25
Punitory ..... 500.00"

The plaintiff moved the court to change the answer to question 4, to answer question 5 "Yes," and, in the event that this motion should be denied, for a new trial. The defendant moved for judgment on the verdict.

The court granted a new trial on the ground that the answers to questions 2 and 4 could not be reconciled, and, if it were assumed that the account of the plaintiff was true, the fourth question should have been answered in the affirmative.

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The court held that the answers to questions 2 and 4 were irreconcilable, and that since the jury found that the plaintiff's testimony as to the conductor's conduct in ejecting the plaintiff was true, it followed that such evidence showed facts necessarily establishing that the conductor acted cruelly and with malice, and hence that this evidence required an affirmative answer to question 4. For this reason the court held that justice would be promoted by granting a new trial.

Upon the appeal from the civil court to the circuit court the order granting a new trial was affirmed. This is an appeal from the order of the circuit court affirming the order of the civil court.

For the appellant there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *Douglas Van Dyke, Jr.*

For the respondent there was a brief by *O'Connor, Schmitz, Wild & Gross,* and oral argument by *E. J. Gross.*

SIEBECKER, J. The defendant contends that the circuit court erred in affirming the order of the civil court granting a new trial. It is claimed that the civil court erroneously granted the new trial upon alleged inconsistencies in the jury's answers to questions 2 and 4. It is manifest that the new trial was not granted by the trial court in its discretion or because the court entertained an opinion that justice had not been done in compensating the plaintiff for the injuries he had sustained. The verdict found separately the items of compensatory and punitory damages, so that the court might award judgment of either or both amounts, according to plaintiff's rights as established by the facts found by the jury in their special verdict. The defendant asked that judgment be awarded the plaintiff upon the verdict for the amount of the compensatory damages and costs of the action. The plaintiff objected to such judgment and made a motion in the alternative, requesting that the court change the answer of the jury

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to question 4 from "No" to "Yes," and, in the event of a denial of such request, that the court grant a new trial. The court refused to change the jury's answer to this question as requested, but granted a new trial upon the ground stated.

It is obvious from the court's ruling and the grounds assigned therefor that he concluded that if the jury, under the evidence in the case, found that the plaintiff was wrongfully ejected from the car by the conductor, they must find that the conductor acted with such cruelty, vindictiveness, and malice as to render defendant liable for punitory damages. We are persuaded that the trial court and the circuit court on appeal erred in this respect. The evidence in many respects is in sharp conflict. The jury evidently believed that the conductor provoked the altercation with the plaintiff by using abusive language toward him when seeking to collect the car fare, and that the plaintiff's conduct did not call for his ejection from the car. This does not necessarily imply, however, that all the plaintiff testified to as to the manner of his ejection must be taken as true. The evidence on this phase of the affair is in sharp conflict. It was witnessed by persons on the car, who testified in the case, and from the whole evidence the jury had good grounds to conclude that the conductor acted wrongfully in the matter, but that there were no such aggravated acts as the plaintiff testified to and that the conductor's acts were free from cruelty and evinced no vindictiveness or malice. The jury were not compelled to believe in their entirety the statements of either of the participants. *Hopkins v. C., M. & St. P. R. Co.* 128 Wis. 403, 107 N. W. 330. The facts and circumstances adduced in the evidence tend to support the conclusion that both parties became actively involved in the affray before it concluded and that both of the participants became aggressive combatants before it ended. In the light of such a situation the jury were justified in finding that the plaintiff's ejection from the car was free from such aggravated acts as amounted to cruelty, and that the conductor did not act

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maliciously in the matter. The facts of vindictiveness and malice must expressly appear and are not to be presumed from the fact that the plaintiff was wrongfully ejected from the car. Their existence is one of inference for the jury from the whole case and not for the court as matter of law under the facts and circumstances adduced in evidence. The allowance of punitory damages in such cases is never a matter of right. As stated in *Topolewski v. Plankinton P. Co.* 143 Wis. 52, 71, 126 N. W. 554:

"In all cases the court should decide whether, in any reasonable view of the evidence, punitory damages would be proper and, if so, to then instruct the jury what elements of fact are requisite to justify such damages and make it plain that whether to allow them or not is left to their sound discretion."

We are led to the conclusion that the jury were well justified, under the evidence, in answering question 4 in the negative, that, in the light of the facts and circumstances of the case, such answer in no way conflicts with an affirmative answer to question 2, and that the trial court erred in holding that there was such conflict in the verdict as required a new trial. The circuit court on appeal should have corrected such error and have awarded plaintiff judgment for the amount of the compensatory damages allowed by the jury, with costs.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to award judgment as indicated in this opinion.

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STATE, Appellant, vs. BROWN, Respondent.

April 24—May 14, 1912.

Criminal law: Bail: Deposit of money in lieu of sureties: Forfeiture: Recovery upon return of defendant.

1. **Where the defendant in a criminal action gave his own personal recognizance and his surety, being unable to qualify, deposited $1,000 with the clerk of the court, who accepted the same in lieu of bail, the transaction constituted a deposit of money in lieu of sureties, under sec. 4816, Stats. (Supp. 1906: Laws of 1901, ch. 104); and, the defendant having absconded, the deposit was properly forfeited and paid into the county treasury.**
2. **Money so forfeited and paid into the county treasury in compliance with law cannot be recovered upon defendant's returning and entering a plea of guilty more than a year after the order of forfeiture was made.**
3. ***It seems* that, had an application been made while the money remained under the control of the court, the court would have power to relieve from the forfeiture, although a year had elapsed.**
4. **Although the money for a deposit by a defendant under said sec. 4816 is furnished by another person, it is considered as a deposit by the defendant himself, and no judgment need be entered against the person furnishing the money.**

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

In June, 1909, the defendant, *Joseph Finnis Brown,* was arrested and charged with a crime. Such proceedings were had that he was admitted to bail upon a recognizance signed by himself as principal and his mother, Mary Brown, as surety. The surety, not having justified, deposited $1,000 with the clerk of the court, who accepted the same in lieu of bail, or, as it was claimed, in lieu of the justifying of the surety, and thereupon the defendant was admitted to bail. The defendant while upon trial before the court and in December, 1909, absconded, and upon motion of the district attorney the court on December 6, 1909, made an order forfeiting the bail so de-

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posited, and pursuant to such order the clerk of the court on July 7, 1910, paid over the $1,000 so deposited to the treasurer of Milwaukee county. In July, 1911, the defendant returned to Milwaukee and surrendered himself to the authorities, and on October 26, 1911, withdrew his plea of not guilty and pleaded guilty and was sentenced to the state prison at Waupun. On November 4, 1911, application was made by Mary Brown, upon notice duly served upon the district attorney of Milwaukee county, for an order to reinstate the recognizance of the defendant which had been forfeited December 6, 1909, and for general relief. The application was based upon an affidavit made by Mary Brown setting forth in effect that on the 28th day of June, 1909, when the defendant was arrested, she signed the undertaking as surety, and, being unable to qualify, deposited with the clerk of the municipal court the sum of $1,000 in lieu of qualification on her part; that while the defendant was being tried he absconded and failed to appear; that thereafter the undertaking and bond were declared forfeited by the court; that in July, 1911, the defendant returned to the city and on August 15, 1911, was taken into custody; that on October 26, 1911, defendant withdrew his plea of not guilty and entered a plea of guilty and was sentenced to the state prison at Waupun, Wisconsin; that affiant is a widow and is dependent upon her own labor for support; that in order to qualify as surety on the undertaking she was obliged to mortgage her home in the sum of $1,000; that she made the affidavit as a basis for a motion that the undertaking and bond of defendant be reinstated and the moneys deposited by her be returned to her. Upon this motion, which was heard November 27, 1911, the court made the following order:

"It is ordered, that the order of this court of December 6, 1909, declaring the recognizance of the defendant forfeited, and that the one thousand dollars ($1,000) so deposited by Mary Brown as a surety be converted into the treasury of Milwaukee county, be and the same hereby is vacated, set

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aside, and canceled, and the recognizance of the defendant reinstated, in force and effect as though it had never been forfeited.

"On like motion, it is further ordered, that the said sum of one thousand dollars ($1,000) so converted into the treasury of Milwaukee county be returned and delivered to the person by whom the same was deposited."

The plaintiff appealed from this order.

For the appellant there was a brief by the *Attorney General, Russell Jackson,* deputy attorney general, *Winfred C. Zabel,* district attorney of Milwaukee county, and *J. Elmer Lehr,* assistant district attorney, and oral argument by *J. E. Kiefer,* assistant district attorney.

E. J. Henning, for the respondent.

KERWIN, J. It is insisted that the court had no power to make the order appealed from, because (1) it was not made at the same term nor within one year after the order forfeiting the bail was made; (2) because the application was not made by the proper party; and (3) that no jurisdiction was obtained of Milwaukee county, hence no order could have been made against it.

The fact that a year had elapsed would not bar relief from the forfeiture upon a proper showing. Had an application been made while the money remained under the control of the court, it may well be that the court would have power to relieve from the forfeiture though the year had elapsed. But no such case is made here. It appears that the order forfeiting the bail was regularly made. The defendant had absconded when the order was made and did not return until more than a year had expired after forfeiture of the bail and the money deposited had been paid into the county treasury in compliance with law. So upon no theory was the court justified in making the order appealed from.

Counsel for defendant frankly admits that if the authority to make the order appealed from rested upon sec. 2832, Stats.

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(1898), it could not be lawfully made. But he insists that no judgment against the surety was ever entered; that the deposit was not made in lieu of sureties, but in lieu of qualification, hence there could be no forfeiture of the deposit and payment thereof into the county treasury as provided by sec. 4816, Stats. (Supp. 1906: Laws of 1901, ch. 104), and the order forfeiting the bail and ordering the money paid into the county treasury in accordance with the statute was void, therefore the one-year limitation does not apply. We cannot agree with counsel in this contention. The argument as well as the conclusions rest upon the assumption that there was no valid forfeiture because the money was not deposited in compliance with the statute. We think, however, that the deposit must be regarded as a deposit in lieu of sureties. The defendant gave his own personal recognizance, and because the surety which he offered could not qualify he gave no surety, and the deposit amounted to a deposit of money under the statute in lieu of sureties. This was the effect of the transaction, therefore the order forfeiting the bail and ordering the money paid into the county treasury was regular. Since the money was deposited in lieu of sureties it must abide the consequences of such deposit. *State v. Wisnewski,* 134 Wis. 497, 114 N. W. 1113. The contention of respondent that no judgment was entered against the alleged surety, Mary Brown, and therefore she is not bound by the forfeiture, and the cases cited in support of this contention, do not reach the instant case. There is no question of suretyship here. Although the money deposited was furnished by Mary Brown, the deposit was the deposit of the defendant under the statute, sec. 4816, as construed by this court in *State v. Wisnewski, supra.* The cases are wholly inapplicable to the situation here.

It follows that the court below in this proceeding had no power to make the order appealed from, and no other questions need be considered.

By the Court.—The order appealed from is reversed.

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WOLF, Respondent, vs. GEGENSEITIGE UNTERSTUETZUNGS GESELLSCHAFT GERMANIA and others, Appellants.

April 24—May 14, 1912.

Mutual benefit societies: Constitution and by-laws: How far contractual: Amendment: Assessment fund: Wrongful diversion of revenues: Injunction: Amotion of officers: Irregularity: Reinstatement: Repayment of expenses of litigation: Equity: Costs: Discretion: Appeal: Review.

1. The "constitution and by-laws" of a mutual benefit society provided that all moneys received from assessments, except three per cent. thereof, should be placed to the credit of a fund established for the payment of benefit certificates and known as the assessment fund, and that the laws in regard to such fund should not be amended except in the manner therein provided. Provision was also made for the collection of additional revenues, to be placed in a general fund, to defray necessary expenses for management, benefits, or agitation. *Held*, that the provision in respect to the assessment fund was contractual and could be modified only by amendment in the manner prescribed, or by mutual consent.
2. The society engaged an organizer, under a contract by which he was to receive as part of his commission seventy-five per cent. of the first twelve assessments of each new member he obtained, and at several successive meetings of the general council a resolution was adopted providing that said seventy-five per cent. of the first twelve assessments should be carried into and credited to an agitation fund; but no amendment of the constitution and by-laws was otherwise attempted. This diversion of moneys from the assessment fund was acquiesced in for several years, but suit for an injunction was finally brought by members of the society. *Held*, that relief against future diversion of the fund was properly granted.
3. Every corporation has at common law, as incident to its existence, the power of amotion. Generally this power is to be exercised only for cause and after notice and hearing, but the statute, or the articles where the statute does not forbid, may provide otherwise.
4. Where officers of a mutual benefit society, acting in good faith for what they deemed to be the best interests of the society,

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and under the advice of counsel, attempted to remove certain subordinate officers, but in so doing proceeded irregularly, without notice or hearing, they should not be required to repay to the society moneys expended by them out of the corporate funds for attorneys' fees and other necessary expenses in unsuccessfully defending an action by the officers so removed to compel reinstatement.

5. In an action against a corporation and its officers to enjoin a wrongful diversion of corporate funds and to recover moneys improperly paid out, judgment having gone in favor of the plaintiffs and the trial court in its discretion having awarded costs against such officers individually, the supreme court on appeal declines to review such discretion.

APPEAL from a judgment of the circuit court for Milwaukee county: GEO. W. BURNELL, Judge. *Modified and affirmed.*

The appellant *Gesellschaft* is a Wisconsin corporation organized under ch. 86, Stats. (1898), as a mutual benefit society furnishing life and sick benefit insurance on an assessment plan to its members. It is formed without capital stock and for benevolent and charitable purposes, and, except such benefit insurance, no dividend or other pecuniary profits can be paid to members. The articles contain provisions for removal of members guilty of immoral conduct, neglecting or failing to support their families, violating the constitution or by-laws, or guilty of acts or conduct calculated or tending to create discord among the members of the society. The society consists of a grand council or central verein and subordinate councils, and the charter members of the society, the officers thereof, and the representatives selected by subordinate councils for that purpose are members of the grand council or central verein. In addition to these articles of organization the society has what it calls "Constitution and By-laws," and this instrument restates and amplifies the purpose and powers of the organization and contains numerous rules and regulations. Among these to collect an income from members as follows: For charters and supplies to a new branch, $100;

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death benefit certificates, each $1; a per capita tax of $1 per member per annum; and small fees for withdrawal cards, traveling cards, etc. This is followed by a provision that the central society may levy and collect additional revenues to defray the necessary expenses for management, benefits, or agitation. There is a death benefit or assessment fund to be paid monthly by the members, classified according to age and amount of benefit certificate. These appear to cover the resources of the organization. There is authority to establish and maintain a fund for the benefit of sick members of the society, to be known as the "General Sick Fund," and thirty per cent. of the per capita tax is to be credited to this fund semi-annually. Also to establish and maintain a fund for the payment of current and other expenditures of the association, to be known as the "General Fund," and this fund is to be credited with all the income of the society, such as receipts for charters, goods, certificates, seventy per cent. of the per capita tax, and three per cent. of the receipts for assessments. Also to establish and maintain a fund for the payment of the benefit certificates, to be known as the "Assessment Fund," and all receipts for assessments are to be placed to the credit of this fund with the exception of the three per cent. above mentioned. This fund seems to be identical with what is sometimes called the mortuary fund of such associations. The association is authorized to establish and maintain a reserve fund, which is to consist of payments for the reserve fund made by members, but three per cent. of these payments may be credited monthly to the general fund. There is also this provision: "This Central Society may levy and collect additional revenues to defray the necessary expenditures for management, benefits, or agitation. All such revenues shall be placed in the General Fund." It is also provided that "the laws in regard to the assessment, reserve, sick benefit, and general funds shall not be amended, except by two thirds of the members of the Central Society present in an annual meeting or

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in a special meeting of the Central Society called for that purpose; and all amendments proposed must be submitted in writing and communicated to all branch societies."

In the year 1905, at the annual meeting of the general council of the central society, there was a resolution adopted creating a new fund, to be known as the "Agitation Fund and the Holdman Fund." This was done because it was found necessary to get in new members, and a solicitor or organizer named Holdman was engaged for that purpose by contract with the society. By this contract Holdman was to obtain new members for the society, and the latter was to pay him as part of his commission seventy-five per centum of the first twelve assessments of each new member which he obtained. This resolution was re-adopted or approved at each annual meeting thereafter for several years, but no amendment of the constitution and by-laws was otherwise attempted. By the resolution this seventy-five per cent. of the first twelve assessments was to be carried into and credited to the agitation fund.

The circuit court, while not denying the power of the society to levy and collect additional revenues to defray the necessary expenditures for management, benefits, or agitation, held that under the foregoing by-laws or constitution this so-called agitation fund could not be created out of the moneys received for assessments, nor could the latter moneys, except three per cent. thereof, be diverted from the "Assessment Fund." But as this had been done from 1905 to 1910 and acquiesced in by the corporation properly represented at its regular meetings and by members there properly represented, all such past transactions would not be disturbed, but an injunction should go against any future or further diversions of these assessments for such purpose.

2. It appeared that certain officers of the corporation appellant had attempted to remove Weingart and Korn, who were members and subordinate officers of said society, on the ground that they had conducted themselves in an unworthy

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manner, but failed to proceed regularly upon notice to Weingart and Korn. The latter applied to the court for reinstatement by *mandamus*. They were reinstated, and the case is reported under the title of *State ex rel. Weingart v. Board, etc.* 144 Wis. 516, 129 N. W. 630, where the reinstatement was confirmed in this court upon appeal. The circuit court found that on or about March 17, 1909, without notice or hearing or cause, the defendant officers of the corporation appellant wrongfully and unlawfully suspended and removed Weingart and Korn from their offices as "guide" and "guard" of said corporation and that they were reinstated by the court. The defendant's officers used and expended the corporate funds for the payment of attorney fees and expenses in said *mandamus* action to the amount of $1,957.79, in spite of written protests by several of the subordinate societies of the corporation. This sum defendant's officers were required to pay back into the treasury. Costs were awarded against the defendant's officers personally. Other claims of the plaintiff were disallowed. The defendants appealed from the judgment, and there are three questions only before this court for consideration: (1) Is the decree proper in so far as it enjoins further diversions of the assessments to the general or agitation fund? (2) Ought the defendant officers be required to pay back into the corporate treasury the fees and expenses disbursed by them in the *mandamus* action mentioned? (3) Were costs properly awarded against appellants?

Louis G. Bohmrich, for the appellants, contended, *inter alia,* that a by-law could be set aside without formal repeal. 3 Clark & Marshall, Priv. Corp. 1951, 1955; *Myer v. Poe,* 79 Ark. 465, 95 S. W. 1005; *Att'y Gen. v. Middleton,* 2 Ves. Sr. 327; *Union Bank v. Ridgely,* 1 Har. & G. 324; *People ex rel. Muir v. Throop,* 12 Wend. 183; *Germania I. M. Co. v. King,* 94 Wis. 439, 69 N. W. 181; *Buck v. Troy A. Co.* 76 Vt. 75, 56 Atl. 285; *Stafford v. Produce E. B. Co.* 16 Ohio C. C. 50; *Marsh v. Mathias,* 19 Utah, 350, 56 Pac. 1074; *Henry v. Jackson,* 37 Vt. 431; *Blair v. Metropolitan Sav. Bank,* 27

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Wash. 192, 67 Pac. 609. As to the liability of defendants to refund corporate funds expended in good faith in litigation, they cited *Kanneberg v. Evangelical C. Cong.* 146 Wis. 610, 131 N. W. 353; *North Hudson Mut. B. & L. Asso. v. Childs,* 82 Wis. 460, 52 N. W. 600; *McElroy v. Minnesota P. H. Co.* 96 Wis. 317, 71 N. W. 652; *Interior W. Co. v. Prasser,* 108 Wis. 557, 84 N. W. 833; *Pixley v. W. P. R. Co.* 33 Cal. 183; *National Bank v. Earl,* 2 Okl. 617, 39 Pac. 391; *Hodges v. New England S. Co.* 1 R. I. 312; *Spering's Appeal,* 71 Pa. St. 11; *State Journal P. Co. v. Madison,* 148 Wis. 396, 134 N. W. 909; *Brown v. DeYoung,* 167 Ill. 549, 47 N. E. 863.

For the respondents there was a brief by *Quarles, Spence & Quarles* and *Walter H. Bender,* attorneys, and *J. V. Quarles* and *W. H. Bender,* of counsel, and oral argument by *J. V. Quarles* and *W. H. Bender.* They cited, among other cases, *Johnson v. Mutual G. B. & L. Asso.* 66 N. J. Law, 683, 51 Atl. 150; *Mutual A. & I. Soc. v. Monti,* 59 N. J. Law, 341, 36 Atl. 666; *Nat. Grand Lodge v. Watkins,* 175 Pa. St. 241, 34 Atl. 602; *Thibert v. Supreme Lodge,* 78 Minn. 448, 81 N. W. 220; *Metropolitan S. F. A. Asso. v. Windover,* 137 Ill. 417, 27 N. E. 538; *Van Atten v. Modern B. of Am.* 131 Iowa, 232, 108 N. W. 313; 1 Thomp. Corp. (2d ed.) § 1016; *Hochreiter's Appeal,* 93 Pa. St. 479, 484, 485; *Bagley v. Reno Oil Co.* 201 Pa. St. 78, 81, 50 Atl. 760, 56 L. R. A. 184; *National Council v. State Council,* 27 App. Cas. (D. C.) 1, 12, 18; *Deuble v. Grand Lodge,* 66 App. Div. 323, 72 N. Y. Supp. 755; *S. C.* 172 N. Y. 665, 65 N. E. 11, 16; *Torrey v. Baker,* 1 Allen, 120; *Flaherty v. Portland L. B. Soc.* 99 Me. 253, 59 Atl. 58; *Baltimore & O. R. Co. v. Baltimore & O. E. R. Asso.* 77 Md. 566, 26 Atl. 1045; *McConnell v. Combination M. & M. Co.* 31 Mont. 563, 79 Pac. 248; *Davis v. Memphis City R. Co.* 22 Fed. 883; *Harbison v. First P. Soc.* 46 Conn. 529.

TIMLIN, J. Had the corporation proceeded to amend its "Constitution and By-laws" in the manner there provided for amending the same, so as to repeal existing regulations and

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create in their stead new rules and by-laws providing for the payment of a percentage of the first twelve assessments to be paid by a new member as a commission for obtaining that member, such action might be within the corporate power and not violative of the corporate contracts with its members, because the assessments on such new members would necessarily have to be loaded so as to include this cost, unless they were much too high in the first place. But under the circumstances appearing in this case, with the "Constitution and By-laws" forming a compact between the corporation and its members, to be modified, if at all, only in the mode and to the extent and by the authority there agreed upon, the corporation could not disregard its obligations to preserve the "Assessment Fund," less three per cent., for the purpose for which it was collected. There was another mode provided for raising the money necessary to pay the expense of obtaining new members and this mode should have been followed. The action of the grand council or central verein was by resolution, and did not purport, as we understand it, to establish a permanent *modus,* but left the "Constitution and By-laws" in force and attempted to legalize and approve their disregard. The only question before us is upon the prospective effect of such action of the grand council. We are satisfied that it does not authorize future and further disregard of the constitution and by-laws. Such corporation has the power to amend or repeal its by-laws and in many cases to suspend their operation in an emergency. The law treats this subject with liberality. But this power of amendment, repeal, or suspension cannot be carried so far as to authorize a breach of contract by the corporation. To attempt the suspension or repeal of a by-law in some forbidden way might be a breach of contract, even though the power of repeal might have been otherwise lawfully exercised. The by-law here disregarded was contractual. The *Gesellschaft* in effect said to its members: all sums derived from assessments except three per cent. shall be held in a fund and

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not otherwise disbursed than for the payment of benefit certificates, and this condition shall continue until changed by amendment in the manner provided for amending the by-laws. To this the holders of the benefit certificates assented when they became members. Thereby not only a by-law but also a contract was created, which could be modified only by proceeding to modify it in the manner there stipulated or by subsequent mutual consent. The proceedings of the central verein were not in the nature of an amendment or attempt to amend the by-law, but rather a suspension thereof for the time being. We think the relief granted by the learned circuit judge against future diversion of this fund in such manner and under such authority was well within the law and must be upheld. *Flaherty v. Portland L. B. Soc.* 99 Me. 253, 59 Atl. 58; *Baltimore & O. R. Co. v. Baltimore & O. E. R. Asso.* 77 Md. 566, 26 Atl. 1045; *Mutual Aid & I. Soc. v. Monti,* 59 N. J. Law, 341, 342, 36 Atl. 666; *Bagley v. Reno Oil Co.* 201 Pa. St. 78, 50 Atl. 760, 56 L. R. A. 184; *Thibert v. Supreme Lodge,* 78 Minn. 448, 81 N. W. 220, 47 L. R. A. 136.

2. Upon the second point made by appellants, the learned circuit court, in its opinion disposing of the case, stated that were the question an open one he might be disposed to accept the views of appellants' counsel with reference to the right of defendants to reimburse themselves out of corporate funds in their hands for their expenses incurred by them in unsuccessfully defending a *mandamus* action for reinstatement by two officers removed by defendants. But he considered that the decision of this court in *State ex rel. Weingart v. Board,* 144 Wis. 516, rather bound him to the contrary conclusion. In this we think he was in error. To the case last cited the corporation was not a party and costs could not have been adjudged against it. The decision as to costs in that case had relation to the issues presented by that case and the parties there before the court. The attempted removal was arbitrary,

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in that it was made without notice of the charges and opportunity for hearing and defense. But this does not necessarily imply bad faith toward the corporation in making the removal or in defending the cause. It does not even necessarily imply bad faith toward the persons removed. There was a fundamental error of procedure, and for this in that case the relators were reinstated. Every corporation has at common law, as incident to its existence, the power of amotion. 2 Kent, Comm. 298; *Neall v. Hill,* 16 Cal. 145, 76 Am. Dec. 508. Generally this power can be exercised only for cause and after notice and hearing, but the statute, or the articles where the statute does not forbid, may provide otherwise. *O'Dowd v. Boston,* 149 Mass. 443, 21 N. E. 949; *People ex rel. Gere v. Whitlock,* 92 N. Y. 191. But grants of such power are strictly construed. *State ex rel. Graham v. Chamber of Commerce,* 20 Wis. 63. The appellants, in the matter of such attempted removal, acted upon advice of an attorney at law. They apparently believed such removal to be in the interest of the corporation. The corporation, if it did not ratify the disbursement, recognized the good faith of the officers attempting to make the removal by offering the aid of the association to raise the money to cover such disbursements. We refer to the resolutions of August 13, 1910. We think the case in this respect is ruled by *North Hudson Mut. B. & L. Asso. v. Childs,* 82 Wis. 460, 52 N. W. 600. See, also, *Spering's Appeal,* 71 Pa. St. 11; *Hodges v. New England S. Co.* 1 R. I. 312, 53 Am. Dec. 624.

3. The costs of this suit in equity might, in the discretion of the circuit court, have been awarded against the corporation solely or against the other defendants, or both, or denied to the plaintiffs. The learned circuit court, in the exercise of such discretion, awarded costs in favor of the plaintiffs and against the defendants, who were officers of the corporation. We perceive no ground for reviewing such discretion.

No other questions, we think, merit attention.

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By the Court.—The judgment of the court below is modified by eliminating therefrom all provisions authorizing the recovery from the defendant's officers of $1,957.79 with interest, and as so modified affirmed; the appellants to recover costs in this court.

WILHELM, Appellant, vs. ORDER OF COLUMBIAN KNIGHTS, Respondent.

April 24—May 14, 1912.

Life insurance: Fraud in application: Agent conspiring with insured: Invalidity of policy: Evidence: Statute changing rules: Waiver: Physicians: Competency: Privilege.

1. An insurance company is not bound by a policy procured by means of false statements by the insured in his application, even though such statements were made at the solicitation of the company's agent and pursuant to a conspiracy to defraud entered into by the agent, the insured, and the beneficiary.
2. The legislature may change rules of evidence even though such change affects pending actions.

[3. Whether the law relating to testimony of physicians could be changed so as to deprive a life insurance company of a valid defense secured by a statement in an application for a policy that the applicant waived "any and all provisions of law now existing or that may hereafter exist, preventing any physician from disclosing any information acquired in attending me in a professional capacity, or otherwise, or rendering him incompetent as a witness in any way whatever,"—not determined.]

[4. Whether sec. 4075, Stats., as amended by ch. 322, Laws of 1911, would prevent an attending physician from testifying in such case, not determined.]

5. Aside from the testimony of physicians in a case where the insured had stated and warranted in his application that he had not consulted a physician within five years and had never been under the care of a physician, the testimony of the beneficiary, the widow of the insured, showing that he consulted a physician and submitted to a surgical operation a few months before making the application, was sufficient to show a misrepresentation as to a material fact, invalidating the policy.

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APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

On or about February 15, 1909, John C. Wilhelm was received into the *Order of Columbian Knights* as an insurance member, and thereafter during his lifetime paid the required dues and complied with the rules and regulations of the order. He died on August 14, 1910, and after proof and due notice of his death demand was made by the plaintiff, the beneficiary of the insured, for the amount due upon the certificate of insurance, which payment was refused, and this action was brought to recover the amount alleged to be due. By its answer to the complaint the defendant alleged that the certificate of insurance was void because of misrepresentations made by the insured in his application for insurance, as to his condition of health, previous illness, etc., and on the trial testimony was introduced tending to show that the insured, prior to the time of his application for insurance, had been afflicted with certain ailments which in his application he denied having had, and that in June, 1908, he was confined to a hospital and at that time underwent a surgical operation. At the close of the testimony the court directed a verdict for the defendant, and from a judgment entered on such verdict this appeal is taken.

Paul D. Durant, for the appellant.

For the respondent there was a brief by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill* and *W. H. Bennett.*

BARNES, J. In his application for insurance, dated January 25, 1909, the deceased stated that he had never had calculus or gravel; that he had never had any other sickness, disease, or injury; that he had not consulted a physician within the preceding five years; that he was never under the care of a physician, and that he had no ailment, disease, nor

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suspicion of any. Deceased warranted all of these representations to be true.

The evidence showed that the deceased consulted one Dr. Tisdale in June, 1908, and stated to him that he had been sick since October, 1907, being first taken with vomiting and dizzy spells, and that he had lost thirty-three pounds in weight, and suffered pain in the upper part of the abdomen; that Dr. Tisdale made an examination and found the liver enlarged and advised a surgical operation; that later Drs. Tisdale and Jobse held a consultation over the deceased, and that on June 20th he went to Trinity Hospital and on June 23d was operated upon. Dr. Tisdale testified that the bowels were grown together and the gall duct leading from the gall bladder to the bowel was closed and the lining of the gall bladder was infected and showed evidences of there having been pus therein at some time.

The application for the policy was solicited and secured by one Hoffmann, an agent for the defendant, although the answers in the application relating to the health of the insured were given to the defendant's medical examiner. The plaintiff undertook to show that defendant had waived its right to claim an avoidance of the contract because of the misrepresentations made by the insured by making the following offer of proof, which the court rejected:

We propose to show that "Mr. Wiihelm was induced to make an application for membership into the order, and submitted to a medical examination, and to make statements in the application which are untrue, and answers to the questions put by the medical examiner which were untrue, and that at the time this application was brought, and before it was signed, *Mrs. Wilhelm* and Mr. Wilhelm both fully advised Mr. Hoffmann of the then exact condition, and previous physical condition of the deceased, and that the deceased objected to making the application, for the reason that he did not think that he could be admitted because of his prior existing condition, and that, relying entirely upon the representation and

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statements of the agent, Hoffmann, Mr. Wilhelm was induced to sign and did sign the application and make the medical examination in suit, and thereupon the policy was issued.

"Court: And make statements in the same that he knew at the time he made them were false?

"Mr. Durant: Untrue, yes.

We have here a case where the agent of the defendant, and the insured and the beneficiary, his wife, entered into a conspiracy to defraud the defendant by securing a policy of insurance by means of false representations, a policy which they knew could not be obtained if the truth were disclosed. If we were without precedent for our guidance, we would have little inclination to make the court the fourth member of that conspiracy by assisting in the consummation of the fraud, but we are not. This case comes squarely within the decision in *Hanf v. Northwestern M. A. Asso.* 76 Wis. 450, 45 N. W. 315, and it would be superfluous to say anything more about this branch of it.

The appellant urges, however, that the evidence of the physicians was incompetent under sec. 4075, Stats., as amended by ch. 322, Laws of 1911. The application contained the following statement:

"And for myself and for any person or persons accepting or acquiring any interest in any benefit certificate issued on this application, I hereby expressly waive any and all provisions of law now existing or that may hereafter exist, preventing any physician from disclosing any information acquired in attending me in a professional capacity, or otherwise, or rendering him incompetent as a witness in any way whatever, and I hereby consent and request that any such physician testify concerning my health and physical condition, past, present, or future."

There are many cases which hold that such a waiver of a statutory privilege is valid. *Fuller v. Knights of Pythias,* 129 N. C. 318, 40 S. E. 65; *Foley v. Royal Arcanum,* 151 N. Y. 196, 45 N. E. 456; *Adreveno v. Mut. Res. F. L. Asso.*

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34 Fed. 870; *Western T. A. Asso. v. Munson,* 73 Neb. 858, 103 N. W. 688; *Trull v. Modern Woodmen,* 12 Idaho, 318, 85 Pac. 1081; *Metropolitan L. Ins. Co. v. Willis,* 37 Ind. App. 48, 76 N. E. 560. And there are other cases which hold that under such a statute as sec. 4075 a physician may testify that he was consulted by a person afterwards deceased and that he attended such person professionally, although he may not disclose the nature of the disease or the character of the treatment. *Nelson v. Nederland L. Ins. Co.* 110 Iowa, 600, 81 N. W. 807; *Briesenmeister v. Supreme Lodge,* 81 Mich. 525, 45 N. W. 977; 10 Ency. of Ev. 127, 128.

But it is said that a radical change was made in sec. 4075 by the amendment of 1911, and that under the latter no physician *"is permitted"* to disclose any information obtained by attending a patient in a professional capacity. It is a well established rule of law that the legislature may change rules of evidence even though such change affects pending actions. Whether a change could be made so as to practically deprive a party of a valid defense accrued under such a provision as that above quoted we need not inquire, and neither are we called upon to determine the effect of the 1911 amendment. The widow of the deceased, the beneficiary under the policy, testified that her husband was operated on at Trinity Hospital during the summer of 1908 by Dr. Tisdale. This testimony was in itself sufficient to show a misrepresentation as to a material fact in the application for insurance. The evidence of the physicians went into detail and showed the condition that was found, but aside from their evidence it was shown that the deceased consulted a physician and submitted to a surgical operation a few months before he made his application for insurance, which facts were denied in the application.

The judgment of the circuit court is right and should be affirmed.

By the Court.—Judgment affirmed.

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TIDMARSH, Administrator, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

April 24—May 14, 1912.

Railroads: Negligence: Death of employee: Comparative negligence: Evidence: Sufficiency: Special verdict: Whose negligence contributed in greater degree to injury: Damages.

1. Findings by the jury in this case, that a switchman who failed to transmit to the engineer a signal to stop given by his foreman was guilty of a want of ordinary care proximately contributing to the injury and death of the foreman, who was crushed between the drawbar of a moving car and that of a standing car to which the train was being coupled, and that the negligence of the switchman was greater than that of the foreman, are *held* to be sustained by the evidence.
2. Under sec. 1816, Stats. (Laws of 1907, ch. 254),—providing in substance that an injured employee shall have a right of action against a railway company, notwithstanding contributory negligence on his part, if the injury was caused "in greater part" by negligence of the defendant; that the court shall submit to the jury, in case both parties be found to have been guilty of negligence contributing to the injury, the question "whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company;" and that where the jury shall find that the negligence of the company "was greater than the negligence of the employee so injured, and contributing in a greater degree to such injury," the plaintiff shall be entitled to recover,—it is error to refuse, upon request, to submit to the jury in explicit language the basic question upon which the statutory liability depends, namely, whose negligence contributed in a greater degree to produce the injury, unless that question can be answered as a matter of law by the court.
3. Findings by the jury that the injured employee and the defendant were each guilty of negligence, that the negligence of each contributed to produce the injury, and that the negligence of the defendant was greater than that of the employee, were not equivalent to a finding that defendant's negligence contributed in a greater degree to produce the injury.
4. *Jensen v. Wis. Cent. R. Co.* 145 Wis. 326, distinguished and limited.

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5. Upon the cause of action which vested in an injured person who lived for an appreciable time after the injury, the damages recoverable are limited to those which he sustained in his lifetime; while the damages accruing to the widow or other relative by reason of his death are limited to the pecuniary loss by reason of such death, and hence accruing subsequent thereto.

MARSHALL, J., WINSLOW, C. J., and SIEBECKER, J., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

Action brought by plaintiff as administrator to recover damages for the death of his intestate, John H. Tidmarsh, alleged to have been caused by the negligence of the defendant. Deceased met his death under the following circumstances: In the yards of the Pennsylvania Coal and Supply Company, located at the southern terminus of Fifteenth street in the city of Milwaukee, the defendant owns and operates two parallel tracks running east and west. One branches from one of the main lines of the railway company which run east and west, and extends southeasterly till it reaches the yards of the coal company, where it runs east and west, and is known as track No. 1, or the north track; the other branches off from the south side of track No. 1, runs parallel with it in an easterly direction, and is known as track No. 2, or the south track.

On the day of the accident, December 24, 1908, a car stood on the north track so close to the switch that a car on the south track could not be moved past it, and a little east of that car there was another car standing on the south track. The deceased, who was foreman of a switching crew, came from the west on the north track with an engine and six or seven cars for the purpose of coupling on to the car standing on the south track. The engine was pushing the cars, and when the easterly car had run past the switch, and was on the south track, the deceased discovered that the cars would not pass the car on the north track, and he concluded to pole the car on the north track east far enough to clear. Thereupon the deceased

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picked up a stick lying near, which was about 6 x 6 and four or five feet long, placed one end against the northeasterly corner of the easterly car on the south track, or against the southwest corner of the car on the north track, and signaled the engineer to come ahead. The signal was repeated by a switchman named Geiger, who was stationed on the top of the easterly moving car, and the engineer started the cars east, and when each end of the stick was in contact with the cars the stick slipped off. Tidmarsh then signaled "back up." The signal was obeyed, and he placed the stick on the southwest corner of the car on the north track and waited for the cars on the south track to come east and strike the stick, and when the stick was struck the car on the north moved east until the timber dropped. The stick dropped because the distance between the cars at the time, cause by the widening of the space between the tracks, was greater than the length of the timber. While holding the stick between the corners of the cars the deceased had his back to the south, and when the timber dropped he turned and walked, facing east, ahead of the moving cars toward the car standing on the south track, and was caught, crushed, and killed between the drawbar of the moving easterly car and the drawbar of the standing car on the south track.

The negligence charged was that the defendant's train crew disregarded and disobeyed the signals of John H. Tidmarsh to proceed slowly with the engine and cars, and that said train crew did negligently, recklessly, and carelessly run said engine and cars, causing said plaintiff's intestate to be thrown against and crushed between one of the said cars being moved by said engine and the car standing upon track No. 2.

The jury returned the following special verdict: (1) That John H. Tidmarsh was killed by a collision between two of defendant's cars on December 24, 1908,—answered by the court; (2) that John H. Tidmarsh gave a signal to the switchman, Geiger, to stop the cars on track No. 2 after staking or

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poling the car on track No. 1 for the last time; (3) that there was a want of ordinary care on the part of switchman Geiger while he was on the moving car on track No. 2; (4) that such want of ordinary care on the part of switchman Geiger proximately contributed to the injury and death of John H. Tidmarsh; (5) that there was a want of ordinary care on the part of John H. Tidmarsh at the time and place in question—answered by the court; (6) that such want of ordinary care on the part of John H. Tidmarsh proximately contributed to his injury and death—answered by the court; (7) that the want of ordinary care of the switchman, Geiger, was greater than the want of ordinary care of John H. Tidmarsh; and (8) damages $5,000.

At the close of the evidence defendant's counsel moved the court to direct the jury to return a verdict for defendant, which motion was denied. The court submitted, and the jury returned, the above special verdict, and from a judgment entered thereon the defendant appealed.

For the appellant there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Van Alstine.*

For the respondent there was a brief by *McCabe & Dahlman,* and oral argument by *L. A. Dahlman.*

VINJE, J. It is claimed by defendant that Geiger was not guilty of actionable negligence. The jury found that the deceased gave him a signal to stop the moving cars after the car was poled the last time, and that he was guilty of a want of ordinary care that contributed to produce the injury. Such want of ordinary care was the failure to transmit the signal to stop the cars. There is evidence to sustain the finding that a signal to stop the cars was given to Geiger by the deceased and that it was not transmitted by the former to the engineer. The failure to transmit such a signal, under the circumstances, must be deemed a sufficient basis for a finding that Geiger was guilty of actionable negligence. But the defend-

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ant argues that, conceding Geiger was guilty of negligence, the negligence of the deceased was greater and contributed in a greater degree to produce the injury, and therefore the court should have granted the motion to direct a verdict for the defendant. The jury found Geiger's negligence was greater than that of the deceased, but no finding was made as to whose negligence contributed in a greater degree to produce the injury, though the defendant asked that such a question be submitted.

The evidence shows that the cars to be coupled were equipped with automatic safety appliances permitting them to be coupled by impact without the necessity of men going between the ends of the cars. The coupling could be, and usually was, done by raising a lever at the corner of the car with one hand, thus lifting the pin, and reaching in with the other hand and opening the knuckle. In our view of the case, the fact that the cars were equipped with automatic couplers is not very significant. Had they been furnished with the old style link-and-pin coupler, there would have been no occasion for a person making the coupling to place himself between the drawbars. By standing on one side or the other thereof the coupling could be made with practically no risk to any portion of the body but the hand. In the instant case the hip and body of deceased were crushed between the drawbars, showing that he was in a position not required by any mode of coupling. Therefore, so far as known, he needlessly placed himself in a dangerous position. Under what assumption of safety he did so will never be definitely known. That he believed himself safe must be taken for granted. That such belief was founded upon the assumption that his signal to stop was obeyed is at least probable. True, as defendant argues, a glance to the rear would have disclosed the fact that it was not obeyed, but such glance was evidently not given. The situation is one from which a number of quite reasonable and varying conclusions can be legitimately drawn, and hence

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the finding that Geiger's negligence was the greater cannot be disturbed.

This brings us to a consideration of whether or not it was error to refuse to submit the question proposed by the defendant requiring the jury to find whose negligence, that of Geiger or that of the deceased, contributed in a greater degree to produce the injury. Sec. 1816, Stats. (Laws of 1907, ch. 254), provides:

"Every railroad company shall be liable for damages for all injuries whether resulting in death or not, sustained by any of its employees, subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employee:

"1. When such injury is caused by a defect in any locomotive, engine, car, rail, track, roadbed, machinery or appliance used by its employees in and about the business of their employment.

"2. When such injury shall have been sustained by any officer, agent, servant or employee of such company, while engaged in the line of his duty as such and which such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent, servant or employee of such company, in the discharge of, or by reason of failure to discharge his duties as such.

"3. In every action to recover for such injury the court shall submit to the jury the following questions: First, whether the company, or any officer, agent, servant or employee other than the person injured was guilty of negligence directly contributing to the injury; second, if that question is answered in the affirmative, whether the person injured was guilty of any negligence which directly contributed to the injury; third, if that question is answered in the affirmative, whether the negligence of the party so injured was slighter or greater as a contributing cause to the injury than that of the company, or any officer, agent, servant or employee other than the person so injured; and such other questions as may be necessary.

"4. In all cases where the jury shall find that the negligence of the company, or any officer, agent or employee of such company, was greater than the negligence of the em-

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ployee so injured, and contributing in a greater degree to such injury, then the plaintiff shall be entitled to recover, and the negligence, if any, of the employee so injured shall be no bar to such recovery."

It will be observed that the substantive part of the act gives a cause of action against a railway company notwithstanding contributory negligence on the part of the plaintiff, provided the injury shall have been caused in greater part by the negligence of the defendant. The administrative parts of the statute also recognize that the crucial test of liability is whose negligence contributed in a greater degree to produce the injury by providing for such a finding in both subd. 3 and 4. This court has consistently recognized such a construction of the statute. In the case of *Jensen v. Wis. Cent. R. Co.* 145 Wis. 326, 128 N. W. 982, there may be language susceptible of a different construction. But it was used in the discussion of the subject as to whose fault was in greater proximate relation to the injury, and it must be deemed limited to that. The language therein used referred to the seventh question, which read: "If you answer the last question by 'Yes,' was said negligence of said plaintiff slighter or greater *as a contributing cause* to his said injury than that of the defendant company's negligence?" thus clearly indicating that the subject of greater or slighter contributing cause was dealt with and not the subject of greater or slighter negligence. And it was suggested that the statutory question could be simplified by eliminating the alternative form thereof so it could be answered responsively by Yes or No. In the case at bar we have findings that the defendant and the deceased were each guilty of negligence; that the negligence of each contributed to the injury; and that the negligence of the defendant was greater than the negligence of the deceased. But the basic question, upon which the statutory liability depends, namely, whose negligence contributed in a greater degree to produce the injury, was not submitted. Conceding that the administrative parts of the

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statute are directory merely, still the fact remains that there is no finding showing that plaintiff is within the substantive part of the statute giving the cause of action, to wit, a finding that the injury was caused in greater part by the defendant's negligence. In the case of *Schendel v. C. & N. W. R. Co.* 147 Wis. 441, 133 N. W. 830, it was held that the right to have the questions as to whose negligence was the greater and whose negligence contributed in a greater degree to produce the injury submitted to the jury was a substantial right when they could not be answered as a matter of law by the court. Such right is not only provided for in the statute authorizing the recovery, and without which none could be had, but it has a substantial basis for its existence in the law of negligence itself. It was therefore prejudicial error to refuse to submit the question requested, unless it can be answered as a matter of law by the court. The observations made respecting the finding that Geiger's negligence was greater than that of the deceased apply equally here. Many legitimate and probable inferences from the situation may be drawn bearing more or less upon the preponderance of the one or the other negligence as a contributing cause. It therefore lies within the field of jury questions, and should be submitted to a jury to answer.

Counsel for plaintiff argues that since the jury found the deceased and the defendant were each guilty of negligence; that the negligence of each contributed to produce the injury; and that the negligence of the defendant was greater than that of the deceased, that the verdict was therefore equivalent to a finding that defendant's negligence contributed in a greater degree to produce the injury than did the negligence of the deceased. He says the negligence of both was found to have contributed to the injury, and the negligence of the defendant was found to be greater, therefore it was found to be a greater contributing cause. This would be true only in the event that it can always be said that the greater negligence contributes in a greater degree to an injury—a proposition not sound in

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fact. To say that the jury, by finding that defendant's negligence contributed to the injury and was greater than that of the deceased, has found that the injury was caused in greater part by the defendant's negligence, is to deprive the defendant of the right to submit to the jury the most vital question upon which its liability depends. The statute plainly contemplates that in every case where different inferences may legitimately be drawn as to whose negligence contributed in greater part to the injury, such question shall in explicit language be submitted to and passed upon by the jury. The statute is clear and definite in its requirements upon that point and a cause of action founded thereon must comply with its terms.

Contention is made that inasmuch as the deceased lived an appreciable length of time after the injury, a cause of action vested in him that survived; that plaintiff has two causes of action, one based upon the right of action that vested in the deceased, and one for the pecuniary loss sustained by the widow; that the cause of action vesting in the deceased survives in its entirety, and under it damages, covering earnings which it is reasonably certain the deceased would have received had he lived, could be recovered; and that it was therefore error to instruct the jury in this action, which is one for the pecuniary loss the widow has sustained, that they should take into consideration the probable future earnings of the deceased had he lived and the probability of her sharing as heir in the additions to his property from future earnings. In *Johnson v. Eau Claire, ante,* p. 194, 135 N. W. 481, it was held that damages for the cause of action that vests in the deceased are limited to damages which he sustains in his lifetime, while damages accruing to the widow or other relative by reason of the death of the deceased are limited to pecuniary loss resulting by reason of such death, and hence accruing subsequent thereto. Such rule of damages permits of no duplication. The estate recovers on a cause of action vesting in the deceased

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the damages he sustained in his lifetime, and the widow or next of kin the pecuniary damages accruing to her or them by reason of his death and subsequent thereto. Hence the court properly told the jury to consider the future probable earnings of the deceased had he lived which they were reasonably certain she would have received from him, and the additions that the earnings of the deceased would probably have made to his property had he continued to live, and the reasonable expectation which the widow had of pecuniary advantage by ultimately receiving a share of such earnings as one of his heirs. *Nemecek v. Filer & S. Co.* 126 Wis. 71, 105 N. W. 225; *Johnson v. Eau Claire, ante,* p. 194, 135 N. W. 481.

For the error of refusing to submit to the jury the question requested by defendant, as to whose negligence contributed in a greater degree to produce the injury, the judgment must be reversed.

By the Court.—Judgment reversed, and cause remanded for a new trial.

The following opinion was filed May 27, 1912:

MARSHALL, J. (*dissenting*). In *Jensen v. Wis. Cent. R. Co.* 145 Wis. 326, 128 N. W. 982, the comparative negligence law was carefully analyzed, all desiring to give the broadest remedial effect practicable to the new legislation which the lawmakers intended, consistent with such reasonable construction thereof as to make it conform to the ordinary settled meaning of terms and the established practice under the Code as regards submitting each question of a special verdict so as to cover one material issue and call for a negative or affirmative answer in respect thereto. It was held that the better way to submit the matter of comparative efficient fault is by this simple question: "If you find that mutual fault of the defendant and the plaintiff proximately caused the injury, was the fault of the defendant the greater?"—this being preceded

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by questions covering the subject as to each of the parties of whether want of ordinary care on the part of each proximately contributed to produce the injury. It was thought, and emphatically declared, that such easily understood proposition, submitted in the order indicated, would definitely elicit from the jury, whether want of ordinary care on the part of defendant proximately contributed to produce the injury and in greater degree than such fault of the plaintiff.

I do not understand there is any purpose to disturb the *Jensen Case* which bench and bar have familiarized themselves with and endeavored for some time to follow; but, the thought is, that the trial court, instead of adopting the suggested question, verbatim, followed, more nearly, this language of discussion leading up to it: "The statute should be administered in its spirit; that requires, only, in case of mutual fault proximately producing the injury, that the verdict shall determine whether the fault of the defendant was the greater."

The suggested question included the words "mutual fault of the defendant and plaintiff proximately produced the injury." So, here, if such words had not been omitted from the vital interrogatory, probably it would be held faultless,—that if negligence of defendant, found to have proximately contributed to produce the injury, was greater, as a producing cause thereof, than want of ordinary care of the plaintiff, found to also have so contributed, then the former did so in greater degree than the latter. In short, that the particular word "degree" is not essential to a complete verdict under the comparative negligence law, though it is necessary to find the fact as to whether want of ordinary care of the defendant was greater, as a proximately producing cause of the injury, than such fault of the plaintiff. Where is there any substantial difference between the suggested question in the *Jensen Case* and the one here? I cannot see any.

It will be noted that the jury were asked by question 3, in connection with question 4, whether want of ordinary care

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of defendant proximately contributed to the injury; then by question 5, in connection with question 6, whether such want of plaintiff also so proximately contributed, and then were asked "If you answer questions 3 and 4 'Yes'"—that is, in effect, find that want of ordinary care on the part of defendant proximately contributed to produce the injury,—"was the want of ordinary care of the defendant greater than the want of ordinary care of the plaintiff?"

Do not the words "want of ordinary care" first used, unmistakably, refer, to want of ordinary care proximately contributing to produce the injury referred to in the fourth question in connection with the third; and the want of ordinary care last mentioned, refer to the fault covered by the fifth question which proximately contributed to produce the injury as found in answer to the sixth question? If so, how can it be said that want of ordinary care which was the greater contributing cause to produce the injury was not such want of care contributing to such result in greater degree? What is the difference between, was there want of ordinary care on the part of defendant proximately contributing in greater degree to produce the injury than want of ordinary care of plaintiff which so contributed; and, was there want of ordinary care of defendant which proximately contributed to produce the injury greater than want of ordinary care on the part of plaintiff—referring by necessary inference to that covered by questions 5 and 6—"which proximately contributed to produce the injury?" If the former was the greater, as there may be as many degrees as the efficient fault of the one might be appreciably greater than that of the other, how can one say it did not contribute in greater degree? Is not all that which is omitted from the question, as regards mere words, included by necessary inference? It seems so.

The trial court evidently endeavored to frame the verdict with scrupulous care to conform to the settled practice of this court and its construction of the comparative negligence law.

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Perhaps it were better to have included words in the seventh question expressly referring to the want of ordinary care which proximately contributed to produce the injury as suggested in the *Jensen Case;* but they were there by necessary inference.

WINSLOW, C. J., and SIEBECKER, J. We concur in the foregoing dissenting opinion by Mr. Justice MARSHALL.

GRAHAM, Respondent, vs. GRAHAM, Appellant.

April 25—May 14, 1912.

Divorce: Judgment: Interlocutory or final? Limited divorce from bed and board: Power to make absolute.

1. Actions for divorce are purely statutory, and only such judgments may be entered therein as are authorized by statute.
2. Except in so far as revocation is expressly provided for in secs. 2370, 2375, Stats. (1898), that part of a divorce judgment which grants the divorce is no more to be altered, revised, or set aside after the term at which it is rendered than any other judgment of a court of record.
3. A judgment of divorce from bed and board for a limited time, granted on the ground that the defendant wife was given to intoxication, and providing that at the end of such time either party "may proceed in the action as he or she shall deem for his or her best interest," was not an interlocutory judgment authorized by sec. 2883, Stats. (1898), but a final judgment; and there was no jurisdiction or authority at the end of the time limited to enter a judgment of absolute divorce, even though the trial court intended by the first judgment to reserve the right to grant an absolute divorce upon the record as it stood at that time, in case the parties should not reunite during the period limited.
4. There was in such case no "condition to be performed," within the meaning of said sec. 2883, Stats. (1898). *Lamberton v. Lamberton,* 125 Wis. 616, distinguished.

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APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

The plaintiff in October, 1908, was granted a divorce from bed and board for two years on the ground that the defendant was given to intoxication. The judgment gave the custody of the four minor children of the parties to the defendant, and provided for the payment of certain sums monthly for her support and that of her children. The judgment also provided that at the end of the two years either party "may proceed in the action as he or she shall deem for his or her best interest." It appears by the opinion of the trial judge that at the time of the judgment the defendant had not been using intoxicating liquors since the commencement of the action, a period of a little less than two years. The parties lived separate and apart after the judgment, and in December, 1910, the plaintiff filed his petition alleging only the entry of the original judgment and that the parties had complied therewith, and praying that an absolute judgment of divorce be granted to him. A general demurrer to this petition was overruled, and an answer was filed by defendant alleging improper conduct of various kinds on the part of the plaintiff during the two years, but not alleging adultery, and praying for the dismissal of the proceeding.

After the taking of testimony the trial court found, among other things:

"1. That upon the findings made in the action at the time the interlocutory judgment herein was entered, the plaintiff was entitled to an absolute decree of divorce, and that the intention of the court at that time in and by said interlocutory judgment reserved the right to enter a final judgment upon the record as it stood at that time, upon the application of either party, providing the parties did not unite during the period of such interlocutory judgment.

"2. That more than two years has elapsed since the date of the entry of such interlocutory judgment, and no appeal therefrom has been had and no order has been made or entered

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since the date of the entry of said interlocutory judgment changing the status of the parties to this action, that the plaintiff and defendant have not lived or cohabited together since the date of the entry of said interlocutory judgment, and that the parties have not and cannot live together as husband and wife.

"3. That the defendant in this action has not since the commencement thereof been given to the use of intoxicants, that there is nothing in the record of the plaintiff which should prevent the court from granting the relief prayed for in his petition, that he is now performing his duties as a father and has, ever since the decree was entered, to the best of his ability, and that he has devotion for his children and has done what he is doing for the best interests of the children."

Other findings with relation to the property and custody of the children were made and the plaintiff was granted an absolute divorce, also the custody of the eldest son, and required to pay a monthly sum for maintenance, while the defendant was given the custody of the other three children. From this judgment the defendant appeals.

T. H. Dorr, for the appellant.

J. M. Clarke, for the respondent.

WINSLOW, C. J. A divorce action is purely the creature of statute, and hence the judgment appealed from cannot be justified unless it is authorized by statute. *Boehler v. Boehler,* 125 Wis. 627, 104 N. W. 840. It is plain that the divorce statute itself does not authorize it. The provisions for the revision and alteration of divorce judgments, with respect to the care and support of the children and the allowances of alimony, do not authorize any change in that part of the judgment granting the divorce. Nor do the provisions authorizing revocation of a judgment of limited divorce upon reconciliation of the parties, or of a judgment *a vinculo* upon remarriage, affect the question here. Secs. 2363, 2369, 2370, and 2375, Stats. (1898).

After the expiration of the term at which it is rendered a

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divorce judgment is no more to be altered, revised, or set aside, so far as the part which grants the divorce is concerned, than any other judgment of a court of record. *Bassett v. Bassett,* 99 Wis. 344, 74 N. W. 780. These principles were fully appreciated by the trial judge, but he thought that under the doctrine laid down in the case of *Lamberton v. Lamberton,* 125 Wis. 616, 104 N. W. 807, the judgment of limited divorce might properly be regarded as an interlocutory judgment under the provisions of sec. 2883, Stats. (1898).

We are satisfied that this view was erroneous. The statute allows the entry of an interlocutory judgment in three definite contingencies and no more, viz.: (1) when there is an account to be taken; (2) an issue of fact to be decided; or (3) some condition to be performed. It is clear that the first two contingencies have no application. In the *Lamberton Case* it was held that the first judgment granting a limited divorce from bed and board was entered on condition that the defendant should refrain from the use of liquor during the continuance of the limited period, and that if he did not a permanent decree should be entered. This was deemed to be a condition within the meaning of the statute. If the defendant abstained, no further judgment was to be entered; if he did not, the divorce was to be made permanent. The case does not reach the present situation. There was nothing here which can in any proper sense be called a condition to be performed. The trial judge says that his intention was to reserve the right to enter a final judgment on the record as it stood at the time of the interlocutory judgment, providing the parties had not united during the period limited. This left it within the plaintiff's power to secure an absolute divorce by refusing to become reconciled with his wife, and this, too, notwithstanding she might (as in fact she did) completely reform from the use of intoxicants and thus remove all cause for any divorce. It amounts to a provision that the plaintiff may obtain a divorce from his wife by doing that which he ought not to do.

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This is not a condition within the meaning of the statute. It is offering a premium for breaking the marital bond.

It is believed that the *Lamberton Case* went as far as is desirable in applying the provisions of the section authorizing interlocutory judgments to divorce actions. That case simply held that a court might temporarily refuse an absolute or permanent divorce to the innocent party notwithstanding good cause might be shown, and grant an interlocutory decree for a limited period in order to allow the guilty party to reform, and in case of such a reformation refuse a permanent decree altogether, or in case there was no reformation enter the permanent decree.

We regard the first judgment entered in the present case as a final and not as an interlocutory judgment. There was therefore no jurisdiction or authority to enter the judgment appealed from.

By the Court.—The judgment appealed from is reversed, and the action is remanded with directions to dismiss the petition of the plaintiff.

EDER, Respondent, vs. GRIFKA, Appellant.

April 25—May 14, 1912.

Husband and wife: Necessaries furnished to wife: Liability of husband: Pleading: Appeal from civil court of Milwaukee county: Judgment when reversed: Return of clerk: Appeal to supreme court: Findings of fact: Presumption.

1. For necessaries furnished his wife a husband is liable only under special circumstances and conditions, and these must be pleaded in order to state a cause of action against him.
2. Under subd. 3, sec. 28, ch. 549, Laws of 1909, judgments of the civil court of Milwaukee county are not to be reversed on appeal unless it affirmatively appears that manifest error in that court deprived the appellant of a fair trial, and that by reason

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thereof his rights cannot be protected and substantial justice done without a reversal of the judgment.

3. No such prejudicial error resulted where, after overruling a demurrer *ore tenus* to a complaint which failed to allege the necessary special circumstances to entitle plaintiff to recover for necessaries furnished to defendant's wife, the trial court proceeded with the trial and found, upon the evidence, that such special circumstances and conditions existed,—there being nothing in the record to show that defendant was surprised by the court's ruling or was unable to produce his evidence on those issues, or that he did not fully meet those issues with such evidence as he could command.

4. Appeals to the circuit court from the civil court of Milwaukee county should be taken in the manner provided by ch. 160, Stats., relating to appeals from justices' courts; and the return of the clerk should contain the evidence taken upon the trial.

5. Where, upon such an appeal, the return did not contain the evidence, but the judgment was affirmed by the circuit court upon the minutes of the clerk and the findings of the judge of the civil court, such findings will, upon an appeal to the supreme court, be presumed to have been sustained by the evidence.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This action was begun in the civil court of Milwaukee county to recover the reasonable value of necessaries furnished by the plaintiff to the defendant's wife at her request.

The complaint alleges that the plaintiff and the defendant are residents of Milwaukee county; that the defendant is the husband of Bessie Grifka; that the plaintiff between certain alleged days, at the request of Bessie Grifka, furnished her twenty-six weeks and four days with board and lodging and $12.50 in cash; that the board and lodging so furnished were reasonably worth the alleged sum; and that, although payment had been demanded from the defendant for the value of the board and lodging and for the money advanced to his wife, payment had been refused. The answer is a general denial.

After the first witness was sworn upon the trial the defendant objected to the admission of any evidence under the com-

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plaint, on the ground that the complaint did not state facts sufficient to constitute a good cause of action. The objection was overruled, the defendant excepted, and the trial proceeded. The minutes of the clerk show that witnesses were sworn in behalf of the plaintiff and in behalf of the defendant and that they gave their evidence; that the hearing of the testimony took all of one afternoon and part, at least, of the next day (none of the evidence is returned as part of the record transmitted to the circuit court on appeal); that after the arguments of the counsel had been concluded the court continued the case for a week; and that at this time the court filed an opinion finding that the claim of the plaintiff was established by evidence and that the defendant was indebted therefor to the plaintiff.

The findings of fact filed by the court state that the defendant and Bessie Grifka were husband and wife during the period during which the plaintiff furnished the wife with boarding and lodging; that the plaintiff was the father of the defendant's wife; that for more than two months after the marriage of the defendant he and his wife lived at the home of the defendant's mother; that two grown brothers of the defendant occupied the same house; that the members of the defendant's family so conducted themselves toward his wife as to show plainly that she was not welcome in the house; that the defendant's wife, prior to going to live at her father's home and while she was there, repeatedly requested her husband to provide a suitable home for her; that he refused and neglected to provide any home for her except the home of his mother, although he was of sufficient financial ability to provide a home; that the defendant took his wife from the home of his mother to a hotel in the city, remained there with her for a while, but finally returned to the home of his mother, leaving his wife at the hotel; that the wife refused to go with him to the home of his mother, because of previous ill-treat-

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ment and humiliation from the members of the family when she was there; that the defendant paid part of the expenses of his wife at the hotel, but withdrew his credit from her there and also notified stores in the city not to sell and deliver any goods to his wife on his credit; that the defendant's wife, while visiting her husband at the home of his mother, was driven therefrom with a knife by one of his brothers; that the defendant's wife was without money at the hotel and the plaintiff paid $12.50 to have her trunk released; that the defendant's wife removed from the hotel to the home of the plaintiff and was there furnished with board, lodging, and laundry during the time for which the plaintiff demands pay; that the board, lodging, and laundry were necessaries; that the defendant, during the period of his married life, had rather reluctantly given his wife not to exceed $40; and that the board and lodging furnished the defendant's wife by the plaintiff were reasonably worth $5 per week.

The court concluded as matter of law that the conduct of the defendant's wife in living separate and apart from her husband and in refusing to cohabit with him at the home of his mother was justified; that the board and lodging furnished her by the plaintiff and the payment of the hotel bill were necessaries; and that the plaintiff was entitled to recover the reasonable value of the board and lodging and the sum paid to the hotel.

An appeal was taken from the judgment of the civil court to the circuit court for Milwaukee county. The clerk of the civil court did not transmit any of the evidence taken on the trial in the civil court, but the judgment of the civil court was affirmed by the circuit court on the minutes of the clerk and the findings of the judge of the civil court. This is an appeal from the judgment of the circuit court affirming the judgment of the civil court.

For the appellant there was a brief by *Arthur A. Mueller,*

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attorney, and *Julius O. Roehl,* of counsel, and oral argument by *Mr. Mueller.*

For the respondent there was a brief by *Roethke & Affeldt,* and oral argument by *George A. Affeldt.*

SIEBECKER, J. It is manifest that the complaint was insufficient in that it failed to allege any of the special circumstances and conditions showing that the defendant was liable for necessaries furnished to his wife. A husband is not *ipso facto* liable for all necessaries that may be furnished his wife. It is only under circumstances and conditions showing a necessity that they be furnished her by others, such as his misconduct compelling her to leave him and their home, his wilful refusal to provide for her, or his deserting her, that the husband is liable for them. Since the special circumstances and conditions creating such a liability are essential to a cause of action for such a claim, they must be alleged to constitute a good complaint in such an action. *Brown v. Worden,* 39 Wis. 432; *Warner v. Heiden,* 28 Wis. 517.

It appears from the record of the proceedings had in the civil court that when the first witness called by the plaintiff to sustain his claim had been sworn, the defendant objected to the reception of any evidence under the complaint upon the ground that it failed to allege facts sufficient to constitute a cause of action. The court overruled the objection and ordered that the trial proceed. The question is: Does this error of the civil court require reversal by the circuit court of the judgment appealed from? It is provided by subd. 3, sec. 28, ch. 549, Laws of 1909, that

"Every judgment of said civil court shall be affirmed or modified and affirmed as so modified, by the circuit court, upon appeal, unless, by reason of manifest prejudicial error in the trial of the action in which such judgment was rendered, any party thereto has not had a fair trial thereof in the civil

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court; but in any such case of mistrial, where substantial justice cannot otherwise be done and the rights of the parties otherwise observed and protected, the judgment of the civil court therein shall be reversed," etc.

It is obvious from the context of this provision that a judgment of the civil court is not to be reversed upon appeal to the circuit court, unless, upon examination of the record of the civil court as returned to the circuit court, it shall appear from such return that "by reason of manifest prejudicial error in the trial" the appellant "has not had a fair trial thereof in the civil court." It is also provided that "in any such case of mistrial, where substantial justice cannot otherwise be done and the rights of the parties otherwise observed and protected," the judgment appealed from is to be reversed and further proceedings, as there provided, are to be had in the appellate court. It seems reasonably clear from the statute that the appellant was not, as a matter of right, entitled to reversal of the judgment by reason of manifest error committed by the trial court. It must furthermore appear in the circuit court that the manifest error resulted in an unfair trial of the action as to the appellant and that by reason thereof substantial justice cannot be done except by a reversal, and that the appellant's rights cannot be otherwise observed and protected. The legislature, in dealing with this subject, evidently designed to make it the rule that the judgment of the trial court should stand unless it should affirmatively appear, upon examination of the record, that the error complained of had such a prejudicial result that the appellant did not have a fair trial, and that by reason thereof his rights cannot be protected and substantial justice done him without a reversal of the judgment appealed from. It therefore devolved on the circuit court to examine the record and determine whether the error complained of had had such an adverse effect upon the appellant's rights as required a reversal of the judgment. Obviously, the object of

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this procedure is to promote the ends of justice and obviate the necessity of retrials of causes on account of such errors, when the appellate court is of the opinion that such a technical mistrial did not produce a miscarriage of justice, and that substantial justice was attained by the judgment appealed from. Applying this test to the instant case, it must be ascertained whether or not the holding of the trial court in overruling the demurrer *ore tenus* prevented the appellant from having a fair trial, whether or not it operated in such a way that substantial justice was not done, and whether or not the rights of the appellant could be observed and protected without a reversal of the judgment. The record shows that the trial court proceeded with the trial, after overruling the demurrer *ore tenus,* and that witnesses were sworn by both parties and their evidence taken. No record of the evidence was returned by the civil court, but the civil court made its findings of facts upon the disputed issues of fact, to the effect that the special circumstances and conditions of defendant's liability for necessaries of his wife were shown to exist. These issues were gone into on the trial and were determined by the court. There is nothing in the record showing that the defendant was surprised by the court's ruling, was unable to produce his evidence on these issues, or that he did not fully meet these issues with such evidence as he could command in defense to plaintiff's claim. Under these circumstances the error of the court's ruling did not deprive the appellant of a fair trial; nor did the ruling against him operate to prevent substantial justice being done and his rights from being observed and protected by the judgment he appealed from. Under such circumstances the provisions of the statutes do not contemplate that the judgment should be disturbed on appeal. Since the evidence is not before us, it is presumed that the findings are sustained by the evidence adduced.

It is to be observed that the return of the clerk of the civil court, pursuant to ch. 160, Stats., should contain the evidence

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taken on the trial. Sec. 3763, Stats. (1898). The procedure for taking an appeal from the civil court to the circuit court shall be in the manner provided by ch. 160 of the Statutes relating to appeals from justices' courts. Subd. 1, sec. 28, ch. 549, Laws of 1909. See *Fred Miller B. Co. v. Milwaukee*, 150 Wis. ——, 136 N. W. 157.

By the Court.—The judgment appealed from is affirmed.

BARLOW, Administratrix, Appellant, vs. FOSTER, Respondent.

April 25—May 14, 1912.

(1-5, 13) *Appeal: Review: Questions of fact: Verdict when sustained: Harmless errors.* (6-11) *Automobiles: Gross negligence: Unlawful speed: Instructions to jury.* (8, 12) *Special verdict: Questions submitted: Omissions: Waiver.* (14, 15) *Jury: Control by court: Urging agreement: Time kept out: Comforts to be provided.*

1. Where there is a fair doubt as to whether a verdict is contrary to the evidence, the fact that the trial court approved it is of controlling weight.
2. A verdict approved by the trial court which has any credible evidence to support it will not be disturbed on appeal.
3. Where there is any room for putting probability on one side against probability on the other, it cannot be said that a verdict is without any evidence to support it.
4. Responsibility for the correct determination of questions of fact in legal actions rests upon the trial court and jury, not upon the supreme court.
5. Where evidence offered on rebuttal is not of new matter, but merely to explain or make more clear evidence previously given, the trial court has a very broad discretion as to its admission.
6. In an action for death of plaintiff's intestate, alleged to have been caused by defendant's wanton and reckless driving of his automobile in which the deceased was riding, by reason of which the car ran into a ditch and was overturned, evidence tending

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to show, among other things, that the car, which had been running about eighteen miles an hour, in the nighttime, met a buggy on a narrow turnpiked road and was forced to pass it on the left side; that the rear wheels of the car skidded to the left, and when defendant attempted to keep it from going into the ditch on that side and to get it back into the center of the road it skidded to the right and went into the right-hand ditch, is *held* to sustain findings by the jury, approved by the trial court, to the effect that the defendant was not running the car at an unlawful rate of speed as he approached the place in question, and that he did not run it rashly, recklessly, or wantonly, and in disregard of the safety of others.

7. Instructions to the jury, with reference to the question whether the car approached the place at an unlawful speed, distinguishing between that period of time and a subsequent period, and stating that evidence as to a sudden speeding up of the car in the effort to keep it from skidding into the left-hand ditch had nothing to do with the question then under consideration, did not invade the province of the jury and were correct.

8. The jury having acquitted defendant of running the car at an unlawful speed and of all the essentials of gross negligence, the question of proximate cause is immaterial and its submission to the jury not prejudicial.

9. An instruction as to the meaning of the word "wilfully" in a question submitted to the jury, which was correct as far as it went but did not define the term as specifically as it might, was not prejudicially erroneous, in the absence of any request for more specific definition.

10. Instructions, quoted in the opinion, as to the words "rashly, recklessly, or wantonly," are *held* to have correctly stated the law as to the meaning of these terms when used to characterize gross negligence.

11. The mere running of the car at unlawful speed in such a case would be ordinary negligence, and would constitute gross negligence only when coupled with such wanton and reckless disregard of human safety as to evince intent, actual or constructive, to injure.

12. Where no request was made to submit any question not embodied in the special verdict the losing party cannot, on appeal, complain that the material issues were not covered.

13. On appeal to this court, no error will be deemed prejudicial or material unless it affirmatively appears that, had it not occurred, the result might probably have been materially more favorable to the party complaining.

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14. The trial judge may properly admonish a jury of the importance, from a public as well as a private standpoint, of using their very best endeavors to agree upon a verdict, making it clear that no effort is being made to coerce any one to surrender his deliberate, honest judgment.

15. Although, after having deliberated some twenty-nine hours, the jury reported that in their opinion an agreement was impossible, and although no conveniences were provided for their rest at night, there was no error in this case in keeping them out more than forty hours,—the issue submitted being simple, fully explained by the trial court, and depending upon evidence of such character that there was little, if any, excuse for such long delay in reaching an agreement, and the jury not having requested to be discharged nor having made any complaint of sickness, exhaustion, or discomfort.

APPEAL from a judgment of the circuit court for Winnebago county: CHESTER A. FOWLER, Judge. *Affirmed.*

Action to recover damages sustained, by the statutory claimants in such cases, for the alleged negligent killing of plaintiff's intestate.

The theory of plaintiff is that defendant, in the nighttime of October 13, 1910, while operating his automobile and having the intestate, by invitation, as a companion, drove along a turnpiked country road between the city of Omro and city of Oshkosh,—well knowing the condition thereof, including all dangers to be avoided, particularly those caused by bridges, culverts, turnpikes, ditches, crossroads, inequalities of the roadbed, and liability to meet travelers on foot, horseback, or with vehicles; and that on account of its being so misty and dark as to render it difficult or impossible to see objects ahead in time to guard against interference, it was perilous to travel at an excessive rate of speed,—in a wanton and reckless manner, utterly regardless of the safety of the intestate; and while so doing met a horse attached to a wagon being driven along the highway, under such circumstances, in view of such wantonness and recklessness, that he could not see the horse in time to control his machine as the necessities of the situation required and which he knew was liable to occur; whereby such

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machine plunged into a side ditch, onto the rails and ties of an interurban track laid on the highway, and was overturned and wrecked, falling upon, crushing, and so injuring the intestate that he died in consequence thereof. The claim of defendant is that, notwithstanding the intestate was riding with defendant as claimed, and was killed by the overturning and wrecking of the automobile, he was so riding, accompanied by two others, at his request and for his accommodation; that the machine was not being driven at an excessive rate of speed nor in a dangerous or wanton manner; that the conditions were such that defendant could and did see the horse ahead in time to avoid danger on account thereof, so far as concerned any fault of his; that he observed the horse a considerable distance ahead standing still, or nearly so, on the south side of the way and intended to pass on the right or south side in the proper and lawful way; that in the exercise of due care he anticipated the person in charge of the horse would move over to the north and proper side of the way, as it was his duty to do, and handled the machine accordingly till it became apparent such person would persist in compelling him to pass on the left; that he then made the proper movement therefor and when opposite the vehicle the machine suddenly skidded upon the grass, where he was compelled to go under the circumstances, causing it to go into the ditch, against the railroad ties in the roadbed, and overturn, injuring the intestate so that he died in consequence thereof without any negligence on defendant's part causing or contributing thereto; that the machine was being operated wholly for accommodation of the intestate and that he rode where he could observe all conditions as well as defendant.

All matters precedent to the right to maintain the action were pleaded and established, leaving as controverted, the allegations as to gross negligence in handling the machine and the recoverable damages, in case of liability being established.

There was evidence tending to prove the following: On the

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occasion in question defendant was out with his machine for the accommodation of deceased. They were old acquaintances and had been intimate friends from boyhood. There were two other persons along who were taken at the request of deceased. The machine approached the place of the accident quite late at night. The road was about sixteen feet wide with an interurban railway track on the south side. It ran east and west and was crossed by another road near the particular place. The traveled track was on a turnpike with quite a ditch on either side. It was dark and somewhat misty. There were efficient headlights lighting the way for some 150 feet ahead. Defendant was experienced in running the machine and believed himself competent to handle it under all conditions liable to arise. During the period immediately preceding a few seconds before the accident, he was going some eighteen miles per hour, more or less. Suddenly he saw a single horse and vehicle in charge of a driver, about 150 feet in advance, coming toward him and somewhat on the south of defendant's right-hand side of the road. That was the side on which defendant was entitled to the right of way. The driver saw defendant coming but neglected to turn to his right as he should have done. The latter did not, at once, check the speed of his machine, supposing the man would turn on the proper side of the road. He persisted in keeping on the wrong side. When defendant was within fifty or seventy-five feet of him, he saw he would be compelled to take the left-hand side in order to pass. He then checked the machine, threw out his clutch, and swerved to the left. At the rate he was going he could have come to a full stop in less than forty-five feet. He succeeded in passing the rig; but, in doing so, was compelled to swerve so to the left that the hind wheel on that side struck the grass, at or near the brink of the ditch, and commenced to rapidly skid so as to carry the back end of the machine into it. Thereupon, he let in the clutch, put on power, and tried to right the machine around into the center

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of the road. It instantly jumped forward and pointed diagonally toward the opposite side. Before he could stop or turn, it skidded to the right, struck the ties of the railroad track, went into the right-hand ditch, and turned over, injuring deceased so as to cause his death. Defendant used the appliances for controlling the machine so as to point it down the road and avoid the danger but it skidded so he lost control of it to the extent that he could not avoid what happened. Neither he, nor, so far as appears, any of his companions, apprehended serious danger till it was too late. No one of such companions, so far as appears, protested in any way, respecting the speed of the machine or the manner in which it was handled. There was conflict respecting the speed of the machine and the particular circumstances of the accident, but no evidence indicating but that all occupants of the auto were in harmony as regards the manner it was operated; and no evidence tending to show defendant had any thought of injuring any one or but that he was safely conveying his companions.

The cause was submitted to the jury, resulting in these findings in substance: Defendant was not running the machine at an unlawful rate of speed as he approached the place where the injury occurred. Running the car at an unlawful rate of speed was not the proximate cause of Barlow's death. Defendant did not run the machine rashly, recklessly, or wantonly and in disregard of the safety of others. The car was run at the rate of eighteen miles per hour as it approached the crossing near the place of the injury. Several exceptions to rulings, before and after verdict, were saved in plaintiff's behalf. Adverse to her, the court approved of the findings of the jury and ordered judgment thereon, which was accordingly entered and plaintiff appealed.

For the appellant there was a brief by *P. H. Martin,* of counsel, and *Gruenewald, Jackson & Gruenewald,* attorneys, and oral argument by *Mr. Martin.*

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For the respondent there was a brief by *Weed & Hollister,* and oral argument by *H. I. Weed.*

MARSHALL, J. Thus the alleged cause of action was for injuring deceased with actual or constructive intent to do so, resulting in his death. The gist of the matter was submitted to the jury in the question as to whether defendant ran the car wilfully and rashly, recklessly or wantonly, and in total disregard of the safety of others. In short, as to whether he committed the very serious wrong,—widely distinguishable from one resting in mere want of ordinary care,—of actual or constructive intent to injure. The court thus early characterized that degree of negligence which is not defendable by ordinary negligence of the injured person, and has, with slight lapses, adhered to it to this day. *Potter v. C. & N. W. R. Co.* 21 Wis. 372; *Randall v. Northwestern Tel. Co.* 54 Wis. 140, 11 N. W. 419; *Lockwood v. Belle City St. R. Co.* 92 Wis. 97, 65 N. W. 866; *Schug v. C., M. & St. P. R. Co.* 102 Wis. 515, 78 N. W. 1090; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446; *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663.

Court and counsel appreciated the nature of the issue, fully, as evidenced by the question particularly referred to, which is in harmony with all others submitted to the jury. The subject is thus referred to for the purpose of bringing, into clear view, the test to which the evidence must be subjected in considering the claim that the verdict is contrary to the evidence, which is the first matter, and, really, the most significant one presented for decision.

In considering such first matter, we must not only take note of the precise issue between the parties, but the fact that the trial court deliberately considered the evidence before judgment and approved the verdict. This latter circumstance is of great and often controlling weight,—always controlling in

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case of fair doubt. We must also keep in significant view the rule that, the verdict of a jury cannot, properly, be disturbed on appeal, merely because of its appearing to be against the clear weight of the evidence, or because, if we were to pass upon the matter as seen in the printed record, we might find differently than the jury did.

If the verdict has any credible evidence to support it,—any which the jury could in reason have believed, leaving all mere conflicting evidence, evidence short of matter of common knowledge, conceded or unquestionably established facts and physical situations,—it is proof against attack on appeal, and that must be applied so strictly, on account of the superior advantages of court and jury for weighing the evidence, that the judgment of the latter approved by the former is due to prevail, unless it appears so radically wrong as to have no reasonable probabilities in its favor after giving legitimate effect to the presumption in its favor and the makeweights reasonably presumed to have been rightly afforded below which do not appear, and could not be made to appear, of record.

From the viewpoints suggested, the evidence has been carefully examined and considered, aided by counsel's careful analysis of it, in the printed as well as upon the oral argument, without discovering any fair ground for saying there is no legitimate basis for the verdict.

In the very nature of things, as indicated by what has been said, the cause cannot be retried here, as to facts, from an original viewpoint. An appellate court does not possess efficient facilities for doing that; hence, the dignity which is and must, in justice, be accorded to the approved verdict of a jury.

It is a waste of time and private and public resources to proceed with expectation that this court can and will weigh mere probabilities against probabilities and strike a balance. The law does not permit it. It would be as liable to promote the cause of wrong as of right to attempt it. It would invade the function of the trial court to do so. Upon it rests a very

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high degree of responsibility for discovering the truth from human evidence. Such court will best fully appreciate that by holding firmly to the doctrine that it cannot be relieved of the responsibility indicated, and giving due weight to its decision. The efficiency of our judicial system may be increased by greater appreciation that, as to facts of a controversy of a legal nature, so long as there is room for any discretion in the matter, the trial court, with its jury of sworn triers, is substantially supreme. Greater appreciation that the responsibility, substantially irrelievably, rests there and of the dignity which this court will accord to initial decisions will stimulate greater efficiency in that field,—greater care in responding to the situation. As a rule, the trial jurisdiction, as to facts in a legal action, is the sole reliance. The exceptions are few, where the evidence below is viewed in the light of correct rules of law.

This somewhat lengthy statement of the situation which counsel for appellant have to face in this case, seems justified by the proposition upon which the argument that the verdict is contrary to the evidence is based. It is stated thus in the brief: "The verdict is against the weight of evidence and is perverse." The alleged element of perversity seems to substantially drop out in the argument, leaving the element that the verdict is contrary to the weight of evidence, as the only one treated so as to challenge attention. True, on the oral argument the proposition was given the cast of, the verdict is entirely unsupported by the evidence; but, that seems to have been based on the thought that plaintiff's theory is so strongly established that the contrary evidence is not worthy of belief. That will not do, so long as evidence on the one side is not wholly discredited by matter of common knowledge, conceded facts, or established physical situations. If there is any room left for putting probability on one side against probability on the other, it cannot be said the verdict is without any evidence to support it.

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In view of the conclusion to which we have come, the above general statement of principles and conditions will furnish as good a basis therefor, and a better precedent for future guidance, than any analytical discussion of the evidence. As a rule, on the mere question of whether the verdict has any sound basis in the evidence, such discussion does not seem to be required or be advisable, and is often hardly excusable. The assurance, in such a case, that the evidence has been carefully examined in all its aspects, and a statement of the result reached, must, ordinarily, suffice. It seems very clear here that there is, at the very best for appellant, a conflict as regards the speed of the machine and very little or no evidence to warrant finding actual or constructive intent to injure.

On the examination of Sheppard, the man with the horse, evidence was elicited, tending, from one viewpoint, to show that the machine came toward him from a considerable distance back at a very moderate rate of speed. He was called, on behalf of appellant, on rebuttal and questioned to show that he observed the machine when so far away that it must have approached at great speed to reach him by the time he traversed the space between where he first noticed it and where it passed him. The questions were objected to as not proper rebuttal and were ruled out. The witness had, in fact, testified very fully as regards the matter, giving supposed distances and physical situations. The jury were permitted to take a view, so they must have had a pretty accurate understanding of where the witness was when the headlight of the machine showed up and where he was at the time of meeting. The court thought that, in view of the facility the jury had for understanding the evidence and reconciling any conflicting statements made by Sheppard, further explanations by him were unnecessary.

When evidence is offered on rebuttal, which is merely explanatory, or to make more clear evidence previously given, not of new matter,—the trial court has a very broad discre-

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tion whether to admit it or not. Not every offer in rebuttal is, strictly speaking, of rebutting evidence. It is often a mere effort of the party to reopen his case, or explain evidence already given, rather than to produce new matter. Any relaxation of the correct rule of practice, which is often advisable, to permit such evidence, is addressed, solely, to the sound discretion of the court. But the dividing line between what is and what is not strictly rebutting evidence, is so shadowy and the discretion of the trial court in the field where evidence may be treated as rebuttal, though not strictly so, so broad that cases are few where the decision below can be successfully challenged on appeal. This is not one of the exceptions.

The trial court put the rulings mentioned upon the ground that the witness had once gone over the whole matter and the jury were possessed of ample facilities for reconciling any contradictions and rejecting any wrong statement. The reason was legitimate and the situation warranted its application. Moreover, it is quite plain that appellant was not prejudiced, because the jury must have rejected the view, which counsel sought by the so-called rebutting evidence to meet, in reaching the conclusion that the machine was running at the rate of eighteen miles per hour in approaching the vicinity of the crossing near where Sheppard was traveling from the time he first saw the machine till it reached him. Counsel concede that, according to the permissible view below which he sought to eliminate, the machine was traveling at the rate of not more than about seven or eight miles per hour; showing that such view was not adopted by the jury. Furthermore, manifestly, appellant was not prejudiced, in any event, because of the substantial absence of evidence to raise respondent's conduct, if negligence, to the grade of constructive intent to injure, involved in a mental condition of constructive utter disregard of the safety of others.

Several complaints respecting instructions given, may well be treated briefly.

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The court said to the jury: "There is evidence tending to prove that after the defendant saw the horse he increased the speed of the car . . . to keep it from skidding into the north ditch, but this evidence of speed has nothing whatever to do with this question," referring to the question of whether the car was running at an unlawful rate of speed as it approached the highway crossing west of the place of injury. The language complained of seems quite free from fair criticism. The existence and nature of the evidence was correctly stated. It related to a time subsequent to that covered by the question. The province of the jury was not invaded in the slightest particular.

The court further instructed the jury, in connection with the foregoing:

"This increase could only have had a bearing upon the degree of skill exercised after the defendant saw the horse, and that is a question in no way involved in or connected with the one we are considering."

That seems strictly accurate when one comprehends just what the court was talking about. The question covered a period preceding the event of speeding up to avoid going into the north ditch and to straighten the car around in the road, if that occurred, as respondent testified. The instruction was given to guard against confusing the two intervals of time. We see no ground for just criticism. The court made no attempt to instruct that there was a sudden speeding up of the car immediately preceding the accident. The fact was stated, and properly so, that there was evidence on the question, but that if there were such speeding up, it was not within the period covered by the question, which was strictly true.

Further criticism is made of submitting the subject of proximate cause to the jury at all, on account of the character of the case and the evidence. There might be some merit in that, if there was any reason to suppose appellant was prejudiced. The jury having acquitted respondent of running the car at

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an unlawful rate of speed, and of all the essentials of gross negligence, the element of proximate cause from any fair viewpoint which could be taken of the matter, is immaterial.

The court, in effect, instructed the jury as to the word "wilfully"—used in the question as to whether respondent was guilty of gross negligence,—that it signifies intentionally or with knowledge, though not necessarily with express intent or purpose. It is said the court erred in not using the words "actual intent" instead of "express intent" and explaining that constructive intent, or intent imputable from the circumstances of the case, is sufficient. The gist of that is, really, that the instruction is right as far as it goes, but might have been phrased so as to have better informed the jury on the point covered by the question to which the language referred. If counsel wanted the words "wilfully" and "wantonly" more specifically defined, they should have made a request in respect to the matter. The charge, as given, is free from error, especially of a prejudicial character.

Further instructions were given in respect to the subject of what constitutes "wilfulness" or "wantonness," which, in the whole, conveyed the correct idea with commendable clearness. It does not seem necessary to quote all of them and discuss counsel's complaints with reference thereto. They were phrased in very familiar language,—evidently copied, substantially, from opinions of this court. We will refer specifically to but one more of the instructions complained of.

Respecting the meaning of the phrase "rashly, recklessly, or wantonly," used in the question as to the alleged degree of respondent's fault, the court said:

"Taking the phrase 'rashly, recklessly, or wantonly' as a whole it means something more than mere inadvertence or inattentiveness or want of ordinary care; it means an indifference to obvious consequences; an indifference to the rights of others; indifference as to whether an injury to another be done or not;"

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concluding with this general explanatory statement:

"The wrongful conduct . . . must indicate such disregard of consequences as to evince little short of actual intent to inflict injury, . . . willingness to perpetrate injury or a purpose to take known chances of perpetrating an injury, and they must constitute the equivalent, so far as turpitude and consequences are concerned, of actual intent and willingness to perpetrate injury."

This court has thus stated the law, as to the meaning of the terms used to characterize gross negligence, over and over again. *Schug v. C., M. & St. P. R. Co.* 102 Wis. 515, 78 N. W. 1090; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446; *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663. In the first case cited the late chief justice, speaking for the court, used this language:

"Gross negligence or carelessness is such degree of rashness or wantonness as evinces a total disregard of the safety of persons or property, and is but little less than intentional wrong. It is such a degree of recklessness or wantonness as would constitute some of the lower degrees of manslaughter in case death should result."

That states the matter quite as strongly as the trial court did in the instruction complained of. It seems quite likely the instructions and verdict were phrased with reference to the language used in the *Schug Case* and others of similar character.

Further complaint is made because the court coupled the element of unlawful rate of speed with that of gross negligence, instead of separating the two so the jury could pass on the latter, though they found no unlawful speed. The case in that respect was submitted in harmony with the claim of appellant in the complaint and down to the end of the trial. No request was made to submit any question not embodied in the verdict. So there is no room for complaint that material issues were not covered. If there be such, they must be regarded as waived by appellant or found against him by the trial court, by force of the statute, ch. 346, Laws of 1907

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(sec. 2858*m*, Stats.), and the practice thereunder. But it seems the whole claim of appellant was fairly submitted. A mere running of the car at unlawful speed would be ordinary negligence, only. Such speed coupled with such wanton and reckless disregard of human safety as to evince intent, actual or constructive, to injure, was the plaintiff's claim, pleaded, tried, submitted, and passed upon.

Some other complaints respecting instructions will be passed without further notice than to give assurance that all have been considered, and to suggest that, notwithstanding the dignity which able counsel for appellant accords to them, we are constrained to say, that, in our view, they do not merit more than this general mention.

Serious fault is found respecting the length of time the jury were kept out in securing a verdict and the circumstance of interference of two circuit judges in the matter, including one against whom an affidavit of prejudice had been filed, rendering the calling in of the judge who presided at the trial, necessary, and undue publicity as to the jury's deliberations. It may be there was too much publicity under the judge temporarily left in charge and that, possibly, he slightly exceeded his authority. But it seems that counsel agreed that he might relieve Judge FOWLER, who presided at the trial, in the main, to the extent which he did, and that no objection was made before verdict. Furthermore, it does not affirmatively appear that appellant was prejudiced in any way.

The mischief of disturbing decisions upon the ground of mere presumption of prejudice from the happening of error, so far as it ever had any place in our jurisdiction, has been thoroughly eradicated by a full return to the letter and spirit of the Code,—voiced in sec. 2829, Stats. (1898), with some legislative assistance which, in the judgment of the writer, was unnecessary,—that no error is prejudicially material unless it appears probable,—appears in an evidentiary way, circumstantially or otherwise, that, had it not happened the result might probably have been materially more favorable to

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the adverse party. *Burns v. State,* 145 Wis. 373, 383, 128 N. W. 987.

Very serious criticism is made because the jury were kept out somewhere about forty hours before a verdict was reached, having reported, in the meantime, and after having deliberated some twenty-nine hours, that, in their opinion, an agreement was impossible and had been admonished in pretty vigorous language that they were to decide, not fail to decide; that unless a jury agreed upon a controversy submitted to them the administration of justice would fail; that there was no way of reaching a conclusion except by the verdict of a jury.

"I see no reason," said the court, "why you gentlemen are not just as competent, just as able, just as likely to decide the case, and decide it right, as the next jury that would be called upon the case would be. . . .

"Now I do not want you to understand by what I say that you are going to be made to agree or you are going to be kept out until you do agree, that is not the idea, but I do want you to understand it is your duty and you must make an honest and sincere effort to arrive at a verdict. Jurors should not be obstinate; they should be open-minded; they should listen to the arguments of others and talk matters over fully and fairly and freely and make an honest effort, as fair-minded men, to come to a conclusion."

The circumstance of the long deliberation, the report, many hours before the end, that an agreement seemed impossible, the fact that no conveniences were provided for rest at night-time, and some others which we will omit to detail, are relied upon to support the claim that the result finally reached was the product of coercion and not of judgment.

For counter circumstances it appears that, the controlling issue submitted was very simple; it was fully explained by the court and depended upon evidence of such character that there was little, if any excuse, for such long delay in reaching an agreement and less for leaving the controversy for another jury to deal with. The trial judge had to face the whole situation and do what he considered justice demanded in the

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particular circumstances. There is no set rule for such matters. Under some circumstances it might not be fair treatment of a jury to keep them out twenty-four hours, and in another, it might almost be an abuse of discretion to discharge them till after the lapse of a much longer time. The judge must be master of the situation, restrained only by the boundaries of a very broad discretion. He must not only be left within the limitation suggested as master of the situation, but efficient administration is promoted by masterful judicial control of it, always paying careful attention to the comfort and health of the jury. He has great power in such field and duty to use it firmly but discreetly.

We may say, in passing, that a trial court might well make provision for jurors, in such circumstances as existed here, to have opportunity to sleep, and do so comfortably and in healthful surroundings. A jury well taken care of by the judicial administrator,—so taken care of as to be impressed with the idea that everything is being done which is reasonably within the power of the judge to do to enable them to give their best thought to the matter in hand to the end that a just conclusion may be reached if possible, will, it is believed, in general, partake of the spirit of the judge in that regard and co-operate to their utmost in finally terminating the controversy submitted to them. The old method of subjecting jurors to more or less hardship in case of delay in arriving at a verdict, may well be substantially done away with,—done away with to the extent of seeing that they have meals furnished seasonably and amply to their satisfaction, have opportunity to partake thereof in comfort, and opportunity to sleep a reasonable portion of time and in reasonable comfort as to something suitable to rest upon, and in such surroundings as to reasonably promote rest. To what extent all this can be done must necessarily depend upon circumstances.

In this case we do not discover anything to indicate that the jury were conscious of being coerced. The indications are that they, with considerable enthusiasm, remained at the work.

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Though they reported improbability of agreeing, they did not at any time request to be discharged or object to being sent back to further consider the case after having come into court or being called in. No complaint was made of sickness or exhaustion or discomfort. The indications are rather that the jurors, in general, were of the opinion that an agreement should be reached and that they preferred not to separate without concluding the matter.

As regards admonitions to the jury, they were well within the administrative authority of the judge. A trial judge may properly admonish a jury of the importance, from a public as well as a private standpoint, of using their very best endeavors to arrive at a harmonious conclusion based on judgment. To awaken or strengthen their appreciation of duty, they may well be admonished, substantially, as the trial judge did here,—the idea being kept prominent, as it was, that no effort was being made to coerce any one to surrender his deliberate honest judgment, but only to secure the best possible consideration of the matter in hand the jury are capable of. The trial judge here was well guarded in his remarks. No person intelligent enough to make a good juror would be liable to decide otherwise than according to his judgment on the evidence by reason of such admonitions, while such might well be called back thereby to the performance of duty after having, in strenuous controversies or otherwise, wandered therefrom, or stimulated to still greater efforts in the line of duty. On the whole, we cannot perceive any error in the court's remarks and no error of a prejudicial character in respect to the jury after they were sent out with the case. Of course, we cannot approve of some publicity there was as to the state of deliberations in the jury room. It were better to preserve the secrecy of such room according to time-honored practice.

By the Court.—The judgment is affirmed.

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APPENDIX.[1]

WILL OF STARK.

January 10—January 30, 1912.

(1, 2) *County courts: Appeal: Allowance after time limited: Bond not seasonably filed: Curing error.* (3–15) *Wills: Construction: "Residue:" "Then living:" Realty: Equitable conversion: Executors: Payment of taxes, etc., from personalty: Accumulations: Perpetuities: Income from realty: Persons presumptively entitled: Expectant estates: "Securities" at "par value:" "Children:" "Nephews."*

1. Under sec. 4035, Stats. (1898), providing that after the time for appealing has expired no appeal from the county court shall be allowed by the circuit court without "reasonable notice" to the party adversely interested, it was not error in this case—a proceeding for construction of a will—to allow such an appeal to be taken on oral notice in court, other appeals in the same matter being then pending, all the parties being present and all except one consenting, the trial of the appeal being continued to a later date and not concluded for several months, and there being no showing of surprise or hardship.
2. Notice of an appeal from the county court having been duly given although the required bond was not seasonably filed, and, after the filing of such bond, the circuit court having proceeded with the trial in all respects as if the appeal had been properly taken, it will be considered on appeal to the supreme court that the circuit court impliedly, if not expressly, approved of the procedure followed, and that the default in the timely filing of the bond was cured.
3. The terms "residuum" and "residuary estate" properly mean what remains of a decedent's estate after debts and expenses are paid and particular legacies deducted.
4. If it appears, however, that a testator intended there should be a succession of residuums to be distributed from time to time, his

[1] The three cases included in this appendix were not printed in their regular order because of the pendency therein of motions for rehearing, which were afterwards abandoned.

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intention in that regard should be carried out despite the usual significance of that term.

5. A will drawn by an experienced and able lawyer for a successful and methodical business man, disposing of an estate of more than half a million dollars, of which about $200,000 was in real estate, gave the testator's wife, aged sixty-three years, the use during life of the homestead and its contents, providing that the taxes and repairs should be paid out of the residue of the estate, also bequeathed to her his horses and carriages and $30,000 in cash and securities, and then set apart in trust $250,000, the income of which was to be devoted to her support during life. At her death $125,000 of this trust estate was to go to found a children's hospital, provided certain conditions should be met within four years after the wife's death, and in default thereof such sum was to fall into the residue of the estate and be distributed under the residuary clause to the then living children of his brothers and sisters, with one exception. Cash legacies of $3,000 (increased by codicils to $5,000) were given to his nephews and nieces at the time of his death. Other cash legacies were given to various relatives, some payable after his wife's death, with the provision that in case of the legatee's previous death the sum bequeathed should fall into the residue. Then came the residuary clause which declared that "after providing for the devises, bequests, and legacies therein mentioned" and "after the use of so much" as was necessary to defray taxes and repairs on the homestead and the payment of two additional legacies, he gave the "balance of the residue and remainder of my estate in equal parts to the then living children of my brothers and sisters," except one. *Held*, that the testator had in mind but one residue, not a succession of them; and such residue could only be definitely determined, and hence distributed, when the bequest to the children's hospital was either earned or forfeited; and that the words "then living" had reference to that time and not to the time of testator's death.

6. Where, as in this case, the scheme of the will can be carried out without the conversion of real property into money, the estate being ample to pay all specific legacies and demands without the sale of any realty, and the will provides explicitly for the sale of the homestead after death of the widow but makes no reference to any other sales, and the residuary clause applies to "all the rest, residue, and remainder of my property . . . both real and personal," the doctrine of equitable conversion cannot be applied so as to construe the will as dealing only with personal property.

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7. Where a will directs that taxes and repairs on the testator's homestead, which is devised to his widow for life, be paid from the residuary estate, these expenses must be paid from the personal estate before resorting to the real estate or the rents thereof.
8. No specific directions having been given for disposition of the income arising from real estate and personalty included in the residuary estate, the testator must be deemed to have directed that it accumulate until the time when such residuary estate is to be distributed.
9. As to the income from the personal estate such accumulation is permitted, but secs. 2060–2063, Stats. (1898), do not permit accumulations of the rents and profits of real estate except for certain specific purposes and uses which are not present here.
10. Under sec. 2064, Stats. (1898), therefore, the rents and profits of real estate must go and should be distributed annually to the persons entitled to the next eventual estate.
11. Such persons in this case are, until the residuary legatees become absolutely fixed by the earning or forfeiting of the hospital bequest, the living nephews and nieces of the testator whose estate in expectancy fulfils all the calls of said sec. 2064.
12. While the word "securities" construed strictly does not cover corporate stock, but rather bonds or evidences of debt, it is generally used in a broader sense and as embracing certificates of stock.
13. Where the testator, who owned both stocks and bonds, bequeathed to his wife $25,000 in cash or, at her election, "*securities* . . . of said amount of $25,000 *at par value*," she was entitled to take bank stocks at their face value, although they were actually worth much more.
14. The word "child" in a will may sometimes be construed as applying to a grandchild, and "nephew" may be held to cover grand-nephew, but only when the evident purpose of the testator demands such a construction.
15. Bequests to "children" of testator's brothers and sisters and to "nephews and nieces" living at the time of his death are *held*, in this case, not to include the son of a nephew who died before the testator, especially in view of the facts that the will was drawn with much care and great precision of expression and that in other instances provision is expressly made therein for the children of a legatee to take in case of the latter's death.

APPEALS from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Modified and affirmed.*

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This is a proceeding for the construction of the will of Charles G. Stark commenced in the county court of Milwaukee county and appealed to the circuit court, and brought to this court by several appeals.

Charles G. Stark, a resident of Milwaukee, died September 20, 1908, testate, leaving a homestead appraised at $23,750, other real estate appraised at $188,500, and personal property appraised at $466,358.99, including certain bank stocks hereinafter referred to. He left no issue, no adopted child, and no issue of any adopted child. He was survived by his widow, *Lucy A. H. Stark,* the principal appellant here, who, at the time of his death, was sixty-nine years old. He was also survived by one brother, Joshua Stark, of Milwaukee, Wisconsin, and one sister, Sarah Jane Smith, of Utica, New York, both of whom have since died, and eight nieces and nephews—*Frank G. Stark* and *Kate A. Inbusch,* children of said Joshua Stark; *William Stark Smith, Carrie M. Smith,* and *Mary L. Spencer,* children of said Sarah Jane Smith; *Julia May Stark* and *Theodora Stark,* children of Theodore F. Stark, predeceased; and *Charles Edward Conde,* child of Martha Conde, predeceased. Charles Edward Stark, a son of said Theodore F. Stark, died before the testator, leaving one child, *Charles Edward Stark.* Mr. Stark executed his will May 27, 1902, the first codicil thereto on March 2, 1904, a second codicil on July 29, 1904, a third codicil February 7, 1905, a fourth codicil October 20, 1905, and a fifth codicil February 18, 1908.

The original will is very long. It consists of twenty-six numbered items or paragraphs, which, as changed by the various codicils (five in number), make the following bequests, in substance:

(1) The use of his homestead to *Lucy A. Hayt Stark,* his wife, during her life, all taxes and necessary repairs during her lifetime to be paid from "the residue of my estate after

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providing for the specific devises, legacies, and bequests hereinafter mentioned."

(2) Household furniture and all other personal property in homestead (except two portraits) to his said wife.

(3) Horses, carriages, and property in barn to his said wife, also $5,000 to be paid immediately after his death.

(4) $25,000 in cash or securities, at her election, "which securities, if such she takes in lieu of cash, shall be of said amount of $25,000 *at par value.*"

(5) $250,000 to *Abbott Lawrence,* as trustee, to be invested and kept invested, and net income to be paid to his said wife. $25,000 of this sum "shall become a part of my residuary estate" on death of wife.

(6) Upon wife's death he gives out of the $250,000 fund last named:

(a) to *Abbott Lawrence,* as trustee, for use of testator's sister, Sarah J. Smith, *if she survive wife,* $30,000, to be kept invested and the net income paid to said Sarah J. Smith, and on her death, if she survive his said wife, or if not, then on the death of his said wife to the surviving child or children of said Sarah J. Smith, and the child or children of any deceased child by right of representation.

(b) to his brother, Joshua Stark, *on the death of his said wife,* $30,000.

(c) to *Abbott Lawrence,* as trustee, *on the death of his said wife,* to hold and invest for a children's hospital to be established in the city of Milwaukee, $125,000.

This last named sum is devised on condition of incorporation of the hospital association and contracting for a $50,000 building within four years after death of his said wife, on the failure to comply with which condition the same to "pass into and become part of the residue of my estate" under residuary clause in item 22, and be distributed as part of the residue in equal portions, share and share alike, to the

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"*then living children* of my brothers and sisters." If conditions are complied with, same to be paid over to proper officers of hospital corporation.

(d) to Beloit College, $10,000.

If said brothers, or either of them, do not survive wife, then after her death such deceased brother's or brothers' share is given to children of such brother or brothers, share and share alike, and if either brother does not survive wife and dies without issue, then upon death of wife his share of this $250,000 is bequeathed to the then surviving children of other brother and sisters, share and share alike.

It would appear that $30,000 of the $250,000 trust fund for the wife's support is not disposed of after her death, but this results from the fact that a $30,000 bequest to Theodore Stark, contained in this clause of the original will, is revoked by the third codicil, because of the death of Theodore before the death of the testator. By the same codicil this $30,000 becomes a part of the residuary estate upon death of the wife.

(7) Upon wife's death homestead to be sold and proceeds to go to hospital trust fund on same conditions as prescribed with regard to that fund. In case said conditions are not fulfilled, then to become part of residue and distributed as provided in residuary clause.

(8) To his brother, Joshua Stark, $15,000, but if Joshua "does not survive me, then to his children *living at the time of my death,* share and share alike."

(9) To his brother, Theodore F. Stark, $15,000, "but in case he does not survive me, then to his children who shall be living at the time of my death, share and share alike."

(10) To *Abbott Lawrence,* as trustee, $15,000 as trust for Sarah J. Smith during her lifetime, and upon her death to her child or children *then surviving,* and the children of any deceased child by right of representation.

(11) To Milwaukee Protestant Home for the Aged, $2,500.

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(12) To American Board of Foreign Missions of Boston, Massachusetts, $5,000.

(13) To Milwaukee Hospital, to endow a free bed in perpetuity, $5,000.

(14) To Milwaukee Orphan Asylum, the income to be used to pay the salary of a manual training teacher, $4,000.

(15) To Layton Art Gallery, to be used in purchasing a painting or other work of art, $5,000.

(16) To each of his nephews and nieces "who shall be living at the time of my death," $5,000.

(17) Revoked by first codicil.

(18) To the vestry of St. Paul's Church for care of cemetery lot in Forest Home Cemetery, $1,000.

To same for maintaining Sunday School and other like work, $5,000.

(19) To Utica, New York, Cemetery Association for care of family lot, $1,000.

(20) To wife, lot in Forest Home Cemetery.

(21) To sister, Sarah J. Smith, the portraits of testator's parents.

(22) All the rest and residue, whether real or personal, "after providing for the devises, bequests, and legacies hereinbefore mentioned, and after use of so much thereof as may be necessary to defray the expense of taxes on my homestead and keeping the same in repair for the use and benefit of my wife, as provided in the first item of this my will, I give, devise, and bequeath as follows:"

"(a) to my nephew, *Charles Edward Conde,* $5,000.

"(b) to my niece, *Carrie M. Smith,* $1,000.

"The balance of the residue and remainder of my property and estate I give in equal parts, share and share alike, to the *then living children* of my brothers and sisters," except *William Stark Smith,* who is excepted because of liberal allowances made to him and his mother during testator's lifetime.

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(23) This item contains certain directions intended to make more clear the testator's purpose as to the children's hospital fund, and are not material.

(24) "Under any and all conditions in which my estate may be at the time of my decease, it is my desire and will that all provisions hereinbefore made in favor of my wife, *Lucy A. Hayt Stark,* shall have precedence over any other gifts, devises, legacies, or bequests contained in this my will, and shall be made to her accordingly."

(25) This item contains provisions as to advancements not material to the controversy.

(26) By this item the testator nominates his wife and Charles E. Dyer (by fourth codicil *William E. Black* is named in case Dyer dies before testator) as executors, and gives directions concerning bonds of executors and trustees, etc. At the close of the item he says: "It is my further wish that the executors herein named shall have ample time in which to administer and settle my estate, so that no property, effects, or assets of my estate shall be unduly sacrificed by too speedy conversion of the same into money."

The questions submitted to the court by the executrix and executors of said will in their petition for the construction of said will, together with the answers of the circuit court thereto, are as follows:

"1st. Whether your petitioners as executrix and executors of said will, and their successors, are authorized to hold during the lifetime of said *Lucy A. Stark* the possession of the residue of the estate of said testator after providing for the specific devises, bequests, and legacies mentioned in the first twenty-one items of said will, consisting of both personalty and real estate, for the purpose of paying therefrom all taxes as the same are annually assessed and levied on said homestead, and all expenses for necessary repairs of the same during the lifetime of said *Lucy A. Stark.*"

"The court answers said first question as follows: Construing the will as a whole, there is nothing to indicate that

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the testator intended the residuary estate to be kept intact during the continuance of the life estate of the widow, although the executors—either by that designation or as trustees—are to continue in power for such duties as may be necessary during such life estate and upon its termination. It is therefore the court's construction that the assignment and transfer of the residuary estate and all the net income therefrom need not await the termination of the life estate, but may be and should be assigned and transferred presently in the due and orderly course of administration; provided, however, that the amount of twenty-five thousand dollars ($25,000) of the said residuary estate shall be retained by the executors or trustees to carry out the testator's instructions with reference to his homestead, as more specifically hereinafter directed."

"2d. If it be the judgment of the court that your petitioners are so authorized, then what disposition, if any, shall they make of the surplus income derived from said residuary estate after the payment of the aforesaid annual taxes and expenses for necessary repairs of said homestead?"

"The answer of the court to the first question disposes of the second question so far as the latter may refer to surplus income derived from the residuary real estate. As to the surplus income, if any, derived from the residuary personal estate to be retained by the executors or trustees, remaining after the payment of annual taxes and expenses for necessary repairs of the homestead, said executors and trustees are instructed and directed to distribute the same in equal parts, share and share alike, to the said *Frank G. Stark, Kate A. Inbusch, Mary Louise Spencer, Carrie M. Smith, Julia May Stark, Theodora Stark,* and *Charles Edward Conde,* their heirs and assigns forever."

"3d. Whether the gift and bequest of the balance of the residuary estate in equal parts, share and share alike, to the then living children of testator's brothers and sisters, excepting said *William Stark Smith,* contained in the twenty-second item of said will, is limited to the nieces and nephews of said testator excepting *William Stark Smith,* living at the time of the death of *Lucy A. Stark,* widow of said testator.

"The court answers said third question as follows: The items of the will containing the words 'then living' are con-

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strued by this court to relate to the date of the death of the testator, and such meaning was the intent of the testator. The gift and bequest contained in item 22 of the will, as modified by the codicil thereto bearing date February 18, 1908, of the balance of the residue and remainder of testator's property and estate in equal parts, share and share alike, to the then living children of testator's brothers and sisters, excepting *William Stark Smith,* is construed by the court as a bequest and devise of testator's residuary estate, both real and personal, in equal parts, share and share alike, to *Frank G. Stark, Kate A. Inbusch, Mary L. Spencer, Carrie M. Smith, Julia May Stark, Theodora Stark,* and *Charles Edward Conde,* who were, at the date of the death of the testator, the only living children of his brothers and sisters, excepting *William Stark Smith,* who was excepted in said codicil from the benefits of said residuary bequests and devise."

"4th. Whether bank stocks or other corporate stocks owned by the testator at the time of his death are securities within the meaning of the provisions of item 4 of said will."

"The court answers said fourth question as follows: While technically and standing alone the word 'securities' may not mean certificates of stock, yet, considered in the light of the wording of item 4 of said will, the condition of the estate, and the intent which seems to permeate the entire instrument, the court is of the opinion that it is in conformity with the wishes and intent of the testator to construe item 4 that the wife of the testator should be permitted to select twenty-five thousand dollars ($25,000) in certificates of stock or bonds scheduled in the inventory; and that the par value means the face value of said stock."

"5th. Whether in the event that *Lucy A. Stark,* widow of said testator, elects to take securities in lieu of cash in satisfaction of the bequest in her favor under item 4 of said will, she is entitled to take securities of the par or face value of $25,000 or securities of the actual or market value of $25,000."

"This question is answered above by the answer of the court to the fourth question propounded by said executors.

"The court further finds that *Charles Edward Stark,* grandson of Dr. Theodore F. Stark, under all the facts and circumstances surrounding the entire will, and by the express terms of the will, does not take by right of representation, and therefore the fifteen thousand dollars ($15,000) bequeathed under

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item 9 to Dr. Theodore F. Stark should be equally divided between *Julia May Stark* and *Theodora Stark,* the children of Theodore F. Stark who were living at the time of the death of the testator, Charles G. Stark.

"The court further finds that under item 16 of said will, which reads as follows: 'I give and bequeath the sum of three thousand dollars ($3,000) to each of my nephews and nieces who shall be living at the time of my death,' which was increased to five thousand dollars ($5,000) by codicil to said will bearing date February 7, 1905, the words 'who shall be living at the time of my death' can have no other significance than that the nephews and nieces living at the time of testator's death should inherit thereby; under which construction said *Charles Edward Stark,* the grand-nephew of the testator, is barred from inheriting by right of representation of his deceased father, and Gertrude McCoy, Bessie King, and Alice Sidford are barred from inheriting by right of representation of their mother, Alice Smith.

"The foregoing construction of item 16 disposes of the contention that the said *Charles Edward Stark* and the said three daughters of Alice Smith are entitled to take by right of representation shares of the residuary estate under item 22 of the will, as modified by codicil bearing date February 18, 1908; and the court finds that neither said *Charles Edward Stark* is, nor the said three daughters of Alice Smith are, entitled to take any portion of said estate under item 22 or under any other item of said will.

"The court further finds that the executrix and executors, as trustees, and their successors, should during the life of *Lucy A. Stark,* the widow, retain in their hands out of the residuary personal estate property of the value of twenty-five thousand dollars ($25,000), which they are authorized to invest and reinvest in such investments as trustees are by statute authorized to make, and out of the income therefrom, and if necessary out of the principal thereof, to defray the expense of all taxes as the same are annually assessed and levied on testator's homestead, and all expenses for necessary repairs of the same, for the use and benefit of the widow during her lifetime, while enjoying the use and occupation thereof, and upon her death to account to the court for the residue of the fund thus retained in their hands; but dividing and distributing, annually, surplus income, if any, as hereinbefore directed.

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"That the acts of the executors in paying the various legacies and in permitting the selection of said bank stock by said *Lucy A. Stark* under item 4 of said will, as found in findings of fact numbered 11, 12, and 13, were proper and legal; and that the executors should deliver the said certificates of deposit, together with accrued interest thereon, to the said *Lucy A. Stark,* taking her receipt therefor, in full performance of said item 4 of said will."

Judgment was entered in accordance with these conclusions.

Lucy A. Hayt Stark, individually and as executrix, appealed from those parts of the judgment providing (1) that the residuary estate should not be kept intact during the lifetime of the widow; (2) that $25,000 only of the residuary estate be retained and invested as a fund to carry out the testator's instructions with reference to his homestead, and the surplus, if any, of the income therefrom be annually distributed to the residuary legatees; (3) that the words "then living" in item 22 of the will relate to the date of the death of the testator, and hence that the residuum of the estate is to be divided among the children of testator's brothers and sisters living at the time of testator's death, except *William Stark Smith.*

Theodora Stark, a minor, and *Julia May Stark,* children of the predeceased brother, Theodore F. Stark, and *Frank G. Stark* and *Kate A. Inbusch,* children of Joshua Stark, and *Charles E. Conde,* a nephew, appealed from that part of the judgment which permitted the widow, under item 4 of the will, to take sixty-two shares of stock in the National Exchange Bank of Milwaukee, and one hundred and eighty-eight shares of stock in the Wisconsin National Bank of Milwaukee, as "securities" at their face value of $25,000, when they were in fact worth $52,564, also from that part of the judgment which directs that the executors retain $25,000 and keep the same invested to defray taxes and repairs upon the homestead.

Charles Edward Stark, a minor son of Charles Edward Stark, a nephew of the testator and son of Theodore F. Stark,

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who died in February, 1895, appealed from that part of the judgment which denied his right to share as legatee under the provisions of items 9, 16, and 22 of the will, as well as from that part of the judgment which allowed the widow to select bank stock as securities at its face value in discharge of the $25,000 legacy.

On behalf of *Lucy A. Hayt Stark,* individually and as executrix, there were briefs by *Carpenter & Poss;* on behalf of *Theodora F. Stark,* a minor, *Frank G. Stark, Kate A. Inbusch,* and *Julia May Stark* there were briefs by *Robert N. McMynn,* as guardian *ad litem* of *Theodora F. Stark,* and *Harper & McMynn,* attorneys, one of said briefs being also adopted and submitted on behalf of *Charles E. Conde* by *Julius E. Roehr,* his attorney, and adopted in part and submitted on behalf of *Mary L. Spencer* and *Carrie A. Smith* by *William W. Wight,* their attorney, who also submitted a separate brief; and on behalf of *Charles Edward Stark* there was a brief by *W. H. Timlin, Jr.,* guardian *ad litem,* and *Patrick W. Dean,* of counsel. The cause was argued orally by *Paul D. Carpenter, Benjamin Poss, Robert N. McMynn, William W. Wight,* and *W. H. Timlin, Jr.*

WINSLOW, C. J. The appellant *Lucy A. Hayt Stark* makes certain objections to the validity of the appeals from the county to the circuit court taken on behalf of *Theodora Stark, Frank G. Stark, Kate A. Inbusch,* and *Julia May Stark* and *Charles E. Conde* jointly, and on behalf of *Charles Edward Stark* individually, and these objections will be first briefly considered. It appears that the judgment of the county court was entered June 23, 1910, and *Lucy A. Hayt Stark* seasonably appealed, but no appeal was taken on behalf of said joint appellants within the sixty-day period prescribed by sec. 4031, Stats. (1898), because they and their attorney were of opinion that the appeal of the widow took the entire matter to the circuit court to be tried *de novo,* and hence that

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no other appeal was necessary. After the trial commenced in the circuit court, however, on December 19, 1910, they became convinced that they could not raise the objections which they wished to raise to the judgment below without taking an appeal themselves, and they made application in open court, upon affidavit showing the facts, for leave to take such appeal immediately, all parties being present, and all consenting thereto, except *Mrs. Stark.* The court, however, overruled her objections and made an order allowing the appeal to be taken at once, and it was perfected on the following day. The statute which gives the circuit court power to thus enlarge the time for appealing, and permits an appeal to be taken after the sixty-day period has expired, requires that the petition therefor must be filed within one year, and that it shall not be allowed without reasonable notice to the adverse party. Sec. 4035, Stats. (1898). The only question here is whether the notice was reasonable. While the notice was short, we are unable to say that it was not reasonable. Under some circumstances, perhaps, it would not be reasonable to allow an appeal to be taken on oral notice in court as this was allowed, but no special circumstances appear here to condemn the action of the court. The trial of the case was continued to a later date and not finally concluded for several months. No showing of surprise or hardship is made; and it seems to have been in furtherance of justice to allow all substantial and *bona fide* contentions concerning this important will to be fought out on the merits at the same trial.

The objection to the appeal of *Charles Edward Stark,* a minor, is of a different nature. In this case the guardian *ad litem* gave the notice of appeal seasonably, but was under the impression that under sec. 4032, Stats. (1898), which relieves certain personal representatives, including guardians, from giving bonds upon their own appeals, no bond was necessary in case of an appeal by the minor. He did not discover his error until the trial of the appeals had begun, and then filed

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a bond in due form in the county court, which was returned at once to the circuit court. It is stated in the brief that it was filed in the circuit court with the approval of the trial judge, but we have found no statement to that effect either in the record or the bill of exceptions. It does appear, however, that the circuit court proceeded with the trial of the case in all respects as if the infant's appeal had been properly taken, and tried and determined the issues raised thereby, and we must conclude that the court impliedly, if not expressly, approved of the procedure followed. This court has already held that the appeal in such cases is so far taken as to give the circuit court jurisdiction by the filing of the notice of appeal within the required limit of time, and that when such a notice has been given the bond may be perfected after the sixty-day period, and the default in the timely filing of the bond may be waived by proceeding to trial without objection, or may be cured by order of the appellate court allowing such belated filing, in analogy to the construction which has been given to the statutes regulating appeals to this court. *Charmley v. Charmley,* 125 Wis. 297, 103 N. W. 1106.

Both appeals are therefore held to be effective.

The most important question in the case arises on the appeal of *Mrs. Stark,* and concerns the meaning and effect of that part of item 22 of the will which disposes of the residuum of the estate. The trial court held in effect that it was the intention of the testator that, after the specific devises to the widow had been paid and the $250,000 fund for the widow's support had been set aside in the hands of the trustee, and a sufficient sum reserved, the income of which would discharge the taxes and needed repairs on the homestead, the balance then in hand should be at once divided among the residuary legatees, such legatees being the children of the testator's brothers and sisters who were living at the time of the testator's death. This construction results in the creation of a series of residuums, or perhaps what might be called a resid-

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uum in parcels. First will be the residuum to be distributed after the payment of the bequests to the widow, the setting aside of the $250,000 trust fund and the $25,000 fund to care for the homestead. Presumptively this distribution will take place very soon after the debts are ascertained and paid. Next will come the distribution of the $55,000, which under items 5 and 6 of the will, as changed by the second and third codicils, is to become "a part of the residuary estate" upon the death of *Mrs. Stark;* and next, in case of default in meeting the conditions, will come the distribution of the funds bequeathed to the children's hospital, which last distribution will take place four years after the death of *Mrs. Stark.* In the meantime there may be several small distributions under the decree of the court by reason of the fact that the court held that, if there should be any surplus income derived from the $25,000 fund after payment of taxes and necessary repairs on the homestead, the same should be distributed to the residuary legatees. The question is whether this is the proper construction of the will, or, in other words, was this the intention of the testator?

There can be no doubt that this construction gives an unusual, if not an absolutely new, meaning to the term "residuum" or "residuary estate." Residuum means what is left. Blackstone defines it as the surplus "when all the debts and particular legacies are discharged." 2 Bl. Comm. 514. It is otherwise defined as "that which remains of a decedent's estate after debts have been paid and legacies deducted." Black, Law Dict. (2d ed.) 1027. "The surplus of a testator's or intestate's estate after discharging all his liabilities; what remains after administration, properly so called, is concluded." 34 Cyc. 1662. See, also, to the same effect, *Robinson v. Millard,* 133 Mass. 236; Bouv. Law Dict. title "Residue;" *Morgan v. Huggins,* 48 Fed. 3.

However, if the testator intended that there should be a number of residuums, to be distributed from time to time as

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they occurred, his intention should, of course, be carried out, and to discover what his intention was in this regard is the first duty. In considering this question a review of the testator's situation and the circumstances surrounding him will be helpful. At the time the original will was made, May 27, 1902, the testator had reached a ripe age and had amassed a considerable fortune. He was evidently an exact and methodical business man, who had thought out a scheme for the disposition of his estate. He was married, but had never had children or adopted children, but he had brothers and sisters who had been blessed with children, and these were, of course, the natural objects of his bounty, at least after due provision for his widow. The amount of his fortune at this time does not appear, but at the time of his death, six years later, it amounted to nearly $700,000, so that it can probably be safely assumed that he was worth considerably more than half a million dollars at the time of the making of the original will. His wife was then sixty-three years of age. Nothing appears as to the pecuniary circumstances of his brothers and sisters or their children. Having determined to make his will, he called in an experienced lawyer to draft it for him. It is said in one of the briefs that this lawyer was his friend, the late Charles E. Dyer, but the statement was withdrawn on the argument, because the evidence of the fact did not appear in the bill of exceptions. The writer of this opinion has no doubt personally that Judge Dyer drew the will from the fact that an envelope is returned with the exhibits in the case which evidently contained the will when drawn, and which is indorsed, in Judge Dyer's unmistakable handwriting, "Chas. G. Stark's Will." However, the question as to what lawyer drew the will is not of great moment. It shows in every sentence and in every line that it was drawn by a lawyer of experience, who knew the meaning of legal terms, who prepared it carefully, and who used no words at haphazard. These two men, the careful, painstaking, successful business man,

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who had evidently laid out his scheme in his mind, and the equally careful and painstaking lawyer, who had spent his life at his profession, collaborated together and produced the will before us.

A mere reading of the will leaves no doubt that there was one idea which was paramount in the testator's mind, namely, the idea that his beloved wife was to be not only adequately but abundantly provided for during her whole life, so that there should be no possibility of her ever encountering want or privation. This paramount purpose is conclusively proven by the provisions made for her in the first five items of the will (which were afterwards substantially augmented by the second and fourth codicils, as the testator's estate grew), and by the twenty-fourth item, by which it appears that his thought returned lovingly to her at the very close of the will, and he again made it apparent that whatever happened to other legatees her interests were to be protected.

Second only to this paramount purpose was the purpose that there was to be no hasty closing out of the estate. Mr. Stark had doubtless spent many years in the amassing of this property. Nearly $200,000 in value thereof was in real estate. He contemplated the ultimate distribution of the bulk of his property among his blood relations, but, like most men who have made their own fortunes by gradual accumulations, he did not wish to see anything sacrificed. The property set apart for the use of his wife, which at the time probably reached well towards one half of the estate, must necessarily be kept on hand during her lifetime, and one half thereof, designed for the children's hospital, might have to be kept for four years after the wife's death. Ten or twelve years does not seem a long time for the prudent management and conversion of an estate which the testator has spent forty or fifty years in acquiring. The provisions of the will generally bear testimony to the desire of the testator to avoid haste, but if there were any doubt of such intention it would be removed

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by the final clause of the will, where the testator expressly says that it is his wish that his executors have ample time to administer the estate, "so that no property, effects, or assets of my estate shall be unduly sacrificed by too speedy conversion of the same into money."

The object next in importance in the testator's mind was evidently a purely philanthropic one. He strongly desired to leave in the city where he had spent his life and amassed his fortune a monument to his memory in the shape of a children's hospital, which was forever to bear his name, and which was to be open "for the reception of such poor, neglected, and destitute children of the age of fourteen (14) years and under who are sick" as the managers should agree to receive.

At the time of the execution of the will the testator had one sister, Sarah J. Smith, and two brothers, Joshua Stark and Theodore F. Stark, still living, and these relatives naturally would be and in fact were the next subjects of his bounty. He therefore gave to them out of the $250,000 fund reserved for the wife's support $30,000 each, but it is important to note that these gifts do not take effect until after the wife's death, and hence might not be carried out for a number of years. As if to make up for the probable long delay in the realization of these bequests, he then makes immediate gifts of $15,000 each to the same legatees, or to their children if the original legatees do not survive the testator, and after making a number of small charitable bequests gives $5,000 to each of his nephews and nieces living at the time of his death. The testator then comes to his residuary estate, and after taking out of it two small bequests gives the balance to the "then living children of my brothers and sisters," excepting one to whom liberal allowances had already been made.

Now if the trial court was right in holding that this residuary bequest goes into effect at once, not only is the result anomalous in that residuary legatees step into beneficial en-

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joyment of their legacies long before specific legatees, but also in that the nephews and nieces of the testator, who were evidently last in the testator's thought, are given preference in point of time to their parents, the brothers and sisters of the testator, who, though advanced in years, are forced to wait for possession of the major portion of their legacies until the death of the wife.

Of course, the testator could do these things if he chose, but if there be doubt as to the intention the improbability of his desiring to do them is significant.

There can be no doubt that the testator had in his mind a definite time when the residuary clause was to take effect. Some event was in his mind when he used the words "then living." Was that event his own death, as the trial court found? We cannot think so.

The will bears every mark of the careful lawyer's hand. Words were not used carelessly or unadvisedly. The scrivener knew just how to express every idea in exact legal phrase. It contains numerous exact conditions and limitations over. Many gifts are made to take effect "upon the death of my said wife," some to take effect if the legatee "shall survive me," or "shall survive my said wife," and some to legatees "living at the time of my death." The scrivener was exact in every expression until he came to this clause, at least. Did he then suffer a mental lapse and use words thoughtlessly and unadvisedly? We think not.

It is true that there is no event like the death of a life tenant, or the like, specifically mentioned in item 22 to which the word "then" can be referred, but we are well satisfied that there was an event in the mind of the testator and the scrivener, and we are further satisfied that such event was not the testator's death, for when there had been occasion to refer to that event in the prior clauses of his will it had been referred to in unmistakably accurate language. What event, then, was it? To our minds it seems certain that it was the final

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completion or determination of the amount of the residuary estate, either by the full performance of the conditions on which the legacy to the children's hospital was based or by the dropping into the residuary fund of that legacy by reason of nonperformance of the conditions. Under the scheme of the will this was the last contingent event which was to take place. All specific legacies, save the two contained in the residuary clause, were expected to be fully carried out and completed before the determination of the fact whether the children's hospital legacy was to be effective or not, and when that fact was determined then it was known for the first time what the residue in fact was, and the "balance" to be divided was first determined. This was the event which was to fix the "balance," and this was the event which would naturally be chosen to fix the partakers in the "balance."

If this conclusion were to be considered doubtful under the language of item 22, considered by itself, it seems that all doubt must be removed when that part of item 6 which provides for the legacy to the children's hospital is considered. By reference to this item it will be seen that $125,000 is placed in trust for the benefit of the hospital upon condition that the hospital association shall be incorporated and shall have contracted for the erection of a $50,000 building within four years after the wife's death, and that in the event of the failure to comply with these conditions the entire bequest is "to pass into and become a part of the residue of my estate under the residuary clause of my will," and "be distributed *as a part of* the residue of my estate in equal portions, share and share alike, to the *then* living children of my brothers and sisters."

These clauses are very significant in two respects: *first,* as tending to show that the testator contemplated one entire residuary fund, of which the lapsed legacy was to become a part, and not three or four separate residuary funds, of which the lapsed legacy was to be the last of the series; and *second,*

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but of far more importance, as showing conclusively that when the words "then living children" were used in this provision they referred definitely and certainly to the event of the failure on the part of the hospital association to comply with the condition, and cannot reasonably be construed as referring to any other event.

In a will where every clause bears the impress of the experienced lawyer's work; where apt phrases have been carefully used prescribing what shall take place in many and various contingencies; and where the same phrasing has been twice used and may well bear the same construction in both places, the fact that it must have a certain construction in one place is certainly very persuasive as a consideration for placing the same construction on it in another place. We have no hesitation, therefore, in holding that the will contemplates but one residuary estate, which is not to be distributed until it be determined that the bequest to the children's hospital has become absolute or has lapsed, and that it is then to be distributed to the children of the testator's brothers and sisters (except *William Stark Smith*) who shall be living at the time of the happening of that event.

There are other persuasive considerations which lead to the same result. Thus, the will and codicils refer several times to "the residue of my estate," and "my residuary estate," always as one definite thing. Now if an experienced lawyer were drawing a will which contemplated such an unusual thing as residuums in relays, or rather a residuum which was only nominally such, but really a receptacle to be at intervals replenished and drained off, it seems passing strange that he should not have definitely provided in unmistakable terms for such replenishments and distributions. The will, however, does no such thing. Notwithstanding the consummate care which is noticeable in every clause, there is no hint of any desire or intention to create a number of successive funds. In this connection it is significant to notice the language of

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the first and twenty-second items, concerning the payment of the taxes and repairs on the homestead. In the first item it is directed that these amounts "be paid from the residue of my estate after providing for the specific devises, bequests, and legacies hereinafter mentioned." In the twenty-second item it is provided that "all the rest, residue, and remainder of my property, of every name and nature, wherever situated, after providing for the devises, bequests, and legacies hereinbefore mentioned and after the use of so much thereof as may be necessary to defray the expense of taxes on my homestead and of keeping the same in repair for the use and benefit of my wife as provided in the first item of this my will, I give, devise, and bequeath as follows," etc. In both places the residue is described as what may remain "after" providing for the specific devises, bequests, and legacies. Now, the word "after" does not always denote subordination in time, but may indicate merely subordination in right. Ordinarily, however, it is used to denote subordination in time, and we see no sign here of an intention to use it otherwise than in its usual sense. Furthermore, the fact that in both places the residue seems to be referred to as one constant, continuing fund, out of which the taxes and repairs are to be defrayed, strengthens the idea that the word "after" is used here in its ordinary meaning.

Again, the testator by the third codicil to his will increased the immediate gifts which he had made to his nephews and nieces "living at the time of my death" from $3,000 to $5,000 each. This is significant in two ways: *first,* it shows how exactly the testator spoke when he desired to make bequests to his nephews and nieces who were living at the time of his death, and thus rebuts the idea that he used the words "then living" as meaning the same thing; and *second,* it would be really useless to make this gift at all, if the residuary clause were to have the construction claimed for it by the respondents, because without it the same beneficiaries would receive

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the same money at practically the same time in their capacity as residuary legatees.

It is objected that the idea of keeping intact so large a fund for a number of years, and thus unnecessarily depriving the residuary legatees of its beneficial use, is fantastic and unjust to the beneficiaries, but this argument can have little weight. The testator could do what he would with his own; his nephews and nieces had no rights save such as he chose to give them. If in the excess of his solicitude for his wife's welfare he chose to impound for years his hardly-earned property to an unnecessary degree, they have really no cause to complain. The testator may have been over-cautious, but he did no injustice to any one by being over-cautious with his own property. It being determined that the testator intended that there should be one residuum, and not a series of recurring residuums, and that the one residuum is bequeathed to those nephews and nieces who shall be living at the time the hospital trust fund is either earned or forfeited by the hospital association, the question as to the disposition of the accumulated rents and profits resulting from the residuary estate during this period of waiting becomes important.

It is suggested that under the terms of the will the whole estate may be regarded as equitably converted into personal property, and that the will must be treated as a will dealing only with personal property. This would be true if the scheme of the will could not reasonably be carried out without the conversion of the real estate into money. *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650. But it seems to be very clear that there is no such situation. There was in the estate somewhat less than $200,000 worth of real estate, exclusive of the homestead. It is not claimed that it will be necessary to dispose of any of this real estate in order to discharge the specific legacies of every kind and provide for the payment of the taxes and repairs upon the homestead. On the con-

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trary it seems entirely certain that the personal estate is much more than sufficient to meet all said demands. Under such circumstances the fiction of equitable conversion cannot be indulged in, especially in the absence of any definite provision in the will looking in that direction. On this subject it is very significant that the will gives very full and explicit authority to the executors to sell and convey the homestead after *Mrs. Stark's* death, but is absolutely silent as to any other conveyance. Evidently the testator did not expect that any other conveyance would be necessary. This conclusion is strengthened also by the fact that at the very beginning of the residuary clause he speaks of "All the rest, residue, and remainder of my property, of every name and nature, both *real* and personal, wherever situate," etc. This would indicate that he had not contemplated that the real estate would be necessarily converted into money prior to the going into effect of the residuary clause.

If he expected the real estate to remain intact, he must have expected also that there would be rents and profits coming in year by year, for much of the real estate was rented and bringing in a profitable income. He gave no specific directions for the disposition of this income, except such small amount as might be necessary to discharge the taxes and repairs upon the homestead, and these must, of course, be discharged out of the personal estate before resorting to the real estate or the rents therefrom. He must be deemed, therefore, by his silence to have directed that it accumulate. *Scott v. West,* 63 Wis. 529, 578, 24 N. W. 161, 25 N. W. 18. As to accumulations resulting from the income of personal estate, there is no legal objection to such a direction (*Scott v. West, supra*); but our statutes do not permit accumulations of the rents and profits of real estate except for certain specified purposes and uses, which are not present here. Secs. 2060–2063, Stats. (1898).

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What then shall be done with the rents and profits of the real estate? That depends upon the question, Who is presumptively entitled to the next eventual estate in the lands?

Sec. 2064, Stats. (1898), provides that "when, in consequence of a valid limitation of an expectant estate, there shall be a suspension of the power of alienation or of the ownership, during the continuance of which the rents and profits shall be undisposed of and no valid direction for their accumulation is given, such rents and profits shall belong to the person presumptively entitled to the next eventual estate."

It seems that this section undoubtedly applies to the present case. The estate of the present living nephews and nieces of the testator is an estate in expectancy under sec. 2033, Stats. (1898), and of the class denominated future estates "limited to commence in possession at a future day, either without the intervention of a precedent estate or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time." Their estate is of the first class of future estates above named, because it commences at a future day without the intervention of a precedent estate. Such a grant is valid. *Ferguson v. Mason,* 60 Wis. 377, 19 N. W. 420. It fulfils all the calls of sec. 2064, *supra.* It is an estate in expectancy; there is a valid limitation upon it in consequence of which there is a suspension of the power of alienation, if not in fact of ownership, during one life in being and possibly four years thereafter; the rents and profits during that time are undisposed of; and no valid direction for their accumulation has been given. Until, therefore, the residuary legatees become absolutely fixed by the earning or forfeiting of the hospital bequest, the living nephews and nieces are presumptively entitled to the next eventual estate, and hence to them belong the rents and profits of the real estate, except such part as may possibly be necessary to defray the taxes and repairs upon the homestead, and this contingency seems very remote, as the personal estate must first be resorted

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to for that purpose. This will necessitate keeping separate accounts of the income from the personal estate and of the income from the real estate, and making periodical distributions of the real-estate income to the presumptive residuary legatees.

As to the joint appeal on behalf of *Theodora Stark* and four others a few considerations will suffice.

Their first contention is that under item 4 of the will the widow could not select certificates of bank stock, because they are not "securities," and that if she can do so she must take the stock at its actual value instead of at its face.

We think the trial court was right upon both these questions. While the word "securities," construed strictly, does not cover corporate stock, but rather bonds or evidences of debt, it has undoubtedly acquired a much broader meaning by general usage. It is said in 25 Am. & Eng. Ency. of Law (2d ed.) at page 180, "The term in its broadest sense embraces bonds, certificates of stock, promissory notes, bills of exchange, etc." The Century Dictionary defines "securities" as "evidences of debt, or of property, as a bond or certificate of stock." See 1 Cook, Corp. (6th ed.) secs. 14 and 305, to the same effect. Indeed it may be said, we think, to be matter of common knowledge that the word is generally used in this broad sense.

The testator at the time of his death possessed both stocks and bonds in good measure. The stocks were most valuable. It was his evident intention to give his wife the opportunity to take instead of cash something which was more valuable than the cash, if she chose. Nothing indicates any intention to limit her in her choice to the less valuable class of papers which are ordinarily called "securities," and we hold, therefore, that the court rightly held that she might choose bank stock as she did. Nor do we see any good reason to doubt that when the testator used the term "par value" he meant "face value," as the trial court held.

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Their second contention is that the sum of $25,000 is too large a sum to set aside out of the residuary estate to provide for the payment of the taxes and repairs on the homestead. Inasmuch as we have held that the entire residuary estate is to be kept intact, this contention necessarily falls.

The appeal of *Charles Edward Stark,* a minor son of Charles Edward Stark, deceased, will be briefly considered. This minor was a grand-nephew of the deceased; his father died in 1905, and his grandfather (Theodore F. Stark, brother of the testator) in 1904, both dying before the testator. He claims to be entitled to share in his father's right in the legacies given by the ninth, sixteenth, and twenty-second items of the will.

The ninth item gives $15,000 to Theodore F. Stark (appellant's grandfather), but provides that in case he does not survive the testator said sum is to be given "to the children of said Theodore F. Stark who shall be living at the time of my death, share and share alike."

The sixteenth item gives $5,000 to "each of my nephews and nieces who shall be living at the time of my death."

The twenty-second item is the residuary clause, and gives the residue to the "then living children of my brothers and sisters."

No one of the terms used in either of these items includes the appellant in its accurate sense. He is not a child of Theodore F. Stark, nor a nephew of the testator, nor a child of the testator's brother or sister. It is true that the word "child" is sometimes properly construed as applying to a grandchild, and nephew may be held to cover grand-nephew, but when such a construction is given the reason is that the evident purpose of the testator demands it.

In the present case there is no such reason. On the contrary, the care with which the will is drawn and the uniform precision of its expressions forbid any such latitude in construction. There are two clauses in the will where express

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provision is made for children to take the share of a parent in case of the death of such parent prior to the happening of a given event, and in each case the most accurate and complete legal phraseology is used to express the idea. In view of these considerations, we have no hesitation in affirming the trial court's conclusions on the points presented by this appeal.

The judgment must be modified in accordance with this opinion so as to determine that the residuary estate shall remain undistributed until the time when the trust bequest to the children's hospital shall be earned or forfeited, at which time the residuary estate becomes vested in the then living beneficiaries named in the twenty-second item; that the surplus income, if any, of the residuary personal estate, past and future, over and above the sums required to pay the taxes and repairs on the homestead, be added to the general residuary estate; that the net income already derived from the residuary real estate be distributed to the present presumptive residuary legatees at once, and that the future income (except in case some part be necessary to defray taxes and repairs on the homestead) be annually distributed to the presumptive residuary legatees until the time when the amount of the residuary estate is determined and the status of the beneficiaries fixed as above set forth. In all other respects the judgment is correct.

By the Court.—The judgment is modified as indicated in the opinion, and as so modified is affirmed. All parties who printed briefs and appeared by counsel in this court will be entitled to tax their statutory costs, to be paid out of the estate.

TIMLIN, J., took no part.

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JENNINGS, Appellant, vs. JOHONNOTT and others, Respondents.

February 22—March 12, 1912.

Municipal corporations: Obstruction in street: Fences: Sidewalks: Trespass by city officials: Special verdict: Disjunctive finding: Omitted facts: Appeal: Presumption: Review: Parties entitled to allege error.

1. Secs. 1326 and 1330, Stats. (1898), relating to encroachments upon and obstructions of public highways, are applicable to cities.
2. Any object unlawfully placed within the limits of a highway is an obstruction if it impedes or seriously inconveniences public travel or renders it dangerous, even though it does not stop travel.
3. A fence in front of a city lot, extending only one foot into the street, is a mere encroachment so long as the fence and walk outside are continuous with those in front of the adjoining lots, but may become dangerous and an obstruction if a jog in the walk and fence is created by the building of a new fence and walk on the true line in front of an adjoining lot.
4. Although a question of a special verdict may be improper because embracing several propositions in the disjunctive, so that an affirmative answer does not indicate unanimous concurrence of the jurors upon any one of them, yet, where no error was assigned thereon and there was no request for separate questions, it will be presumed on appeal, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), that the trial court found in support of the judgment on the material issues not passed upon by the jury.
5. A party cannot assign error upon the admission of evidence concerning irrelevant matters in respect to which he first gave testimony, or which was brought out by his counsel either as part of his own case or on cross-examination of witnesses for the adverse party.
6. In an action against city officials for tearing down plaintiff's fence and constructing a sidewalk, where punitory damages were claimed, it was competent for defendants to assert that they acted in good faith in removing the fence (which intruded into the street) because it was necessary to build a new sidewalk and they wished to build it on the true line, upon which an adjoining walk had been built.

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7. If, in laying a new sidewalk in front of plaintiff's lot, city officials confined their operations to the street, they cannot be held guilty of a trespass, even though they ignored the provisions of the law to such an extent that plaintiff would not be chargeable with the cost of the new walk.

APPEAL from a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

The plaintiff is the owner of lots 3, 4, and 5, and the north five feet of lot 6, block 29, Carman's addition to the city of Monroe. This property is located on the east side of Adams street and had been inclosed by a fence for many years. Plaintiff also owned at one time other property lying immediately to the south of that described, and a board walk had been maintained adjacent to said property and on the east side of Adams street for about thirty-five years. One De Haven purchased from the plaintiff a parcel of ground immediately south of that above described as being now owned by her, and built a residence thereon during the year 1909. He desired to put in a cement sidewalk on Adams street adjacent to his property and he employed a surveyor to locate the street line. The survey showed that the fence which plaintiff maintained stood in the neighborhood of a foot in the street at the southwest corner of her property. De Haven built a cement walk in accordance with the survey, which, when finished, left a jog in the walk as above indicated. There was a boxed fence post which was eight inches square and which stood wholly in the street at the point indicated and there was a cap on the post which extended two inches further into the street. The fence extended into the street about three inches at the northwest corner of the plaintiff's property and was built on a comparatively straight line, so that it extended not less than three nor more than twelve inches into the street at any point. In the year 1910, when De Haven built his fence, the city authorities served notice on plaintiff requesting her to build a walk of the same material in front of her property, and some of them testified that she agreed to do so. However, she neg-

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lected to build the walk, and during the month of October, 1910, the city authorities tore down the fence and constructed a walk. Plaintiff brings this action against them to recover damages for the alleged trespass committed.

The jury found (1) that the fence was within the east line of Adams street; (2) that it was so far within the east line of the sidewalk ordered to be built in May, 1910, as to necessitate its removal in order that the walk might be built as ordered; (3) that in May, 1910, plaintiff had knowledge of the fact that the fence was so located with reference to the sidewalk; (4) that plaintiff had knowledge of the fact that the fence was so located with reference to the sidewalk at the time she promised to build the sidewalk in September, 1910; (5) that the fence in question incommoded, hindered, or endangered public travel along the east side of the street; (6) that defendants used reasonable care in removing the fence; (7) that the cost of replacing the fence in as good condition as it was prior to its removal would be $12.50; (8) that defendants were not actuated by wilful or malicious motives in removing the fence; (9) that plaintiff was not entitled to punitory damages. From a judgment rendered for defendants on this verdict plaintiff appeals.

For the appellant there was a brief by *F. W. Hall* and *John L. Sherron,* and oral argument by *Mr. Hall.*

For the respondents there was a brief by *A. S. Douglas,* attorney, and *Jeffris, Mouat, Oestreich & Avery,* of counsel, and oral argument by *L. A. Avery.*

BARNES, J. The provisions of secs. 1326 and 1330, Stats. (1898), are applicable to cities. Sec. 1347, Stats. (1898); *State v. Leaver,* 62 Wis. 387, 22 N. W. 576; *Pauer v. Albrecht,* 72 Wis. 416, 39 N. W. 771; *State v. Pomeroy,* 73 Wis. 664, 41 N. W. 726; *Hubbell v. Goodrich,* 37 Wis. 84.

The principal question in the case is whether the fence constituted an obstruction within the meaning of sec. 1326, Stats.

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(1898), or an encroachment within the meaning of sec. 1330. If the former, the city officials might summarily remove it; if the latter, they might not. Any object unlawfully placed within the limits of a highway is an obstruction if it impedes or seriously inconveniences public travel or renders it dangerous, and it is not at all necessary that such object should stop travel in order to be an obstruction. The cases so holding are numerous. *Neff v. Paddock,* 26 Wis. 546, 552; *Hubbell v. Goodrich,* 37 Wis. 84, 86; *State v. Leaver,* 62 Wis. 387, 392, 22 N. W. 576; *State v. Pomeroy,* 73 Wis. 664, 665, 41 N. W. 726; *Chase v. Oshkosh,* 81 Wis. 313, 319, 51 N. W. 560; *Bartlett v. Beardmore,* 77 Wis. 356, 365, 46 N. W. 494; *Konkel v. Pella,* 122 Wis. 143, 146, 99 N. W. 453; *Jones v. Tobin,* 135 Wis. 286, 115 N. W. 807.

Undoubtedly up to the time the De Haven walk was built the fence was merely an encroachment. The building of this walk on the correct line materially changed the situation, and what was before an encroachment might then become an obstruction. Four witnesses testified that the fence constituted an obstruction dangerous to public travel. The reasons advanced for this conclusion were: (1) pedestrians walking along the east side of the De Haven walk might thoughtlessly run into the post; (2) school children running along carelessly might bring their faces and eyes in contact with the cap on the post; (3) pedestrians walking northward on the De Haven walk when it was dark might run against the post and suffer injury; (4) three persons walking abreast could not pass the jog in the walk without one of them dropping back. We think this evidence was sufficient to warrant the jury in finding that the fence was dangerous to public travel and therefore an obstruction. *Neale v. State,* 138 Wis. 484, 487, 120 N. W. 345. This issue was submitted to the jury by the following question: "Did the fence in question incommode, hinder, or endanger public travel along the east side of said street?" To which the jury answered "Yes." The question

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submits three disjunctive propositions and might be answered in the affirmative without unanimous concurrence on any one of them by the jurors. No error is assigned on the form of the verdict and there was no request that the different propositions be made the subject of separate questions, and if there is any infirmity about the question we must presume a finding by the trial court in support of the judgment on the material issues not passed upon by the jury.

It is argued that the court erred in admitting testimony with respect to building the sidewalk adjacent to plaintiff's property, and that no evidence should have been received as to the condition of plaintiff's sidewalk. The condition of plaintiff's walk was testified to by plaintiff before resting her case and in answer to questions propounded by her own counsel. Evidence in reference to the building of the new walk was also offered by plaintiff's counsel as part of their case in chief, the portion of the examination of *Johonnott* as an adverse witness, taken before trial and which was read, dealing largely with that subject. The evidence bearing on this assignment of error, given by the witnesses *Johonnott* and *Ruegger,* and quoted in appellant's brief, was brought out on cross-examination by appellant's counsel, so they cannot predicate error on it. There was no ruling on such evidence, and presumably the court would have sustained an objection thereto had counsel objected to their own questions. Other evidence said to have been given by *Johonnott* on page 132 of the record was in fact given by the witness *Roth* on pages 133 and 134 of the record, and was elicited by plaintiff's counsel on cross-examination. The only part of the evidence quoted in the brief which was brought out by defendants was a statement of the witness Mackey that the new walk could not be built where it was without removing the fence. This was a self-evident proposition. No error was committed in receiving evidence of the character complained of, and in any event the appellant is in no position to complain. The question of punitory damages was submitted to the jury, and it was en-

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tirely proper for the defendants to assert that they acted in good faith in removing the fence because it was necessary to build a new sidewalk and they desired to build it on the line of the walk already constructed.

Furthermore, appellant claims that she is entitled to judgment because the city officials committed a trespass in laying the walk. In support of the contention last suggested it is said that the city officials ignored the provisions of law, in that they failed to declare the walk defective, passed no order requiring the old walk to be removed, and never served a written order or resolution on plaintiff, as required by sec. 925—204, Stats., as amended (Laws of 1907, ch. 674). Waiving the question that no such ground of recovery is relied on in the complaint, we do not see how the city officers can be held guilty of a trespass for laying a sidewalk in a street. These defects, if they existed, might enable plaintiff to resist payment of the expense of the walk, but did not make officers who confined their operations to the street trespassers on plaintiff's lots.

By the Court.—Judgment affirmed.

NOVKOVIC, Plaintiff in error, vs. THE STATE, Defendant in error.

March 16—April 3, 1912.

Criminal law: Murder: Separate trials: Evidence: Confessions of codefendant: Conspiracy: Instructions to jury.

1. There was no abuse of discretion in denying an application by one of two defendants jointly charged with murder, for a separate trial on the ground that she desired to call her codefendant as a witness, where, previous to the trial, such codefendant had made two confessions in both of which he implicated her, and there was no showing that he had changed his attitude or

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had made any different statements or was willing to, but merely the affidavit of the moving party, made on information and belief, that she could prove by him that she was not guilty; and where upon the trial such codefendant declined to take the stand.

2. Where such application was also based on the ground that the confessions of the codefendant were calculated to prejudice her upon a joint trial, it was not error to deny it if such confessions were proper to go before the jury in case she were tried separately.
3. The mere fact that defendants jointly charged with murder were co-conspirators in the crime, does not render the confession of one admissible against the others.
4. Upon *prima facie* proof that one of two codefendants admitted the truth of a confession made by the other, such confession becomes competent evidence against the former.
5. The trial court having had the advantage of seeing the witnesses on the stand and hearing them testify, its decision to admit the confession of one defendant as evidence against his codefendant is sustained notwithstanding the written testimony is not clear,—particularly in view of the fact that the jury was instructed to disregard such confession unless satisfied beyond a reasonable doubt that its truth was admitted by the codefendant.
6. Erroneous general instructions as to the admissibility of statements and acts of co-conspirators and the evidence of an accomplice, referring evidently to confessions of a codefendant who did not testify, were rendered harmless by an explicit instruction that such confessions were binding only on the defendant making them unless, beyond a reasonable doubt, they were acquiesced in and assented to by the other.
7. The trial court is not required in a criminal case, even upon request, to take up the different items of evidence relied on to establish the defendant's guilt and instruct the jury as to each that it is insufficient in itself to prove guilt.
8. Upon the trial of a wife and her alleged paramour for the murder of her husband, a requested instruction to the effect that the jury must find the wife not guilty unless "she was an active participant in the design and doing her part at the time in its furtherance," was misleading, in that the jury might infer therefrom that the wife could not be convicted unless she assisted the other defendant in delivering the blows which resulted in her husband's death, and was therefore properly refused, the court correctly charging that it was sufficient if a conspiracy in fact existed and the wife conspired, confederated, and agreed with her codefendant to commit the murder.

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ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

The plaintiff in error, hereinafter called the defendant, was convicted of the crime of murder in the first degree. The murdered man, Steve Novkovic, was the husband of the defendant, and he was stabbed to death on the evening of July 23, 1911, by one Pajo Mravic. The evidence upon which the defendant was convicted, with the exception of a confession made by Mravic, was circumstantial. After the murder was discovered the defendant and Mravic were taken to the office of the chief of police and interrogated. The defendant told her story first and was followed by Mravic. Both were sworn and interrogated at the coroner's inquest, the defendant again being examined first. The principal difference between their statements related to the responsibility of the defendant for the crime committed. Mravic stated that he had sustained illicit relations with the defendant for a considerable period of time before the murder was committed; that defendant expressed a desire to be rid of her husband and encouraged him, Mravic, to kill him; that she said her husband was brutal to her, and a drunkard, and that in the event of his death she would get $800 from a society to which he belonged and that with this money she and Mravic could have a good living; that she was getting no money from Mravic and he was refusing to do anything to her husband and they could not love each other any more; that on the day of the murder he went to Novkovic's boarding house about 4 o'clock in the afternoon, and the latter asked him to go to one of the parks and join a society he belonged to, and that he, Mravic, asked *Mrs. Novkovic* if she would go along with them, to which she replied that she would not because he would not do anything to her husband "to get him away;" that he then said, "All right, if you want me to kill him I will do it tonight, and you are going to get my head off with this;" to which she replied she would keep still about it; that he then told her to dress her-

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self; if she wanted him to do anything it would be tonight; that all three of them started for the park, first visiting the "Zoo" and later going to another park. They seemed to have some difficulty in locating the park where the society to which Novkovic belonged was holding a picnic. They went to a saloon and had some drinks, then boarded a street car and went a couple of blocks to the end of the line and then started on foot for the place where they were informed the picnic was. By this time it was about half past 9 o'clock in the evening and it was dark and raining. Mravic said the defendant was walking ahead, that he was next, and that Novkovic brought up the rear, and that defendant said to him, "There is nobody here, now you got a chance to do it," and that he answered "be quiet." After proceeding a little farther, Mravic stabbed Novkovic in the throat and inflicted about a score of wounds on him, any one of a half dozen of which would have been fatal. Defendant and Mravic then returned and had sexual intercourse on the way home. The parties were Croatians and could not speak English. There was a Croatian on the car on which they rode home, but defendant said nothing to him about the murder. On arriving home she told her boarders that a couple of bums had done up her husband, but said she could not tell where they were when the attack was made.

The defendant admitted that she had sexual intercourse with Mravic a number of times before the murder and also on the night of the murder and after it was committed. In the statement made before the chief of police she said these acts were not voluntary on her part, but that she submitted because she was afraid of Mravic. In the statement made before the coroner she admitted acts of intercourse, including one act on the night the killing took place, but did not claim that she was acting under duress. In the statements made before the coroner and before the chief of police she denied that she knew Mravic was going to kill her husband. There is no very material difference between the statements of

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Mravic and defendant as to the movements of the parties on the day of the killing, or as to what transpired, except as has already been noted.

The interpreter who acted at the examination before the chief of police testified that defendant told him after Mravic concluded his statement that she had nothing to say against it, that she had no objection to it, but that everything she said was true. This alleged statement made to the interpreter was not taken down by the reporter.

The interpreter who acted at the coroner's inquest might have understood the Croatian language very well, but the record indicates that the use of English came awkwardly to him. He testified that defendant sat close to Mravic so that she could hear all he said and that she did nothing to indicate that she disapproved of his statement. He also testified that he asked her if she heard what Mravic said and that she replied in the affirmative. He then detailed a conversation which took place between them, and which may be fairly said to mean that he asked her whether Mravic's confession was true, and that she replied that it was all right.

For the plaintiff in error there was a brief by *E. T. Fairchild,* attorney, and *Lenicheck, Robinson, Fairchild & Boesel,* of counsel, and oral argument by *E. T. Fairchild.*

For the defendant in error there was a brief signed by the *Attorney General, Winfred C. Zabel,* district attorney, and *Andrew Gilbertson,* assistant district attorney of Milwaukee county; and the cause was argued orally by *Russell Jackson,* deputy attorney general, *Mr. Zabel,* and *Mr. Gilbertson.*

Barnes, J. The defendant moved for a separate trial, which motion was denied. At the close of the state's evidence the defendant asked that the court instruct the jury that the statements made by Mravic before the chief of police and the coroner were binding on him only. This request was denied. The defendant later asked that the jury be instructed that the

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confessions of Mravic were binding on him only, unless they were satisfied beyond a reasonable doubt that the defendant *Novkovic* assented thereto, and that unless they were so satisfied they should dismiss the confessions from their minds as to her and return a verdict of not guilty, unless they were satisfied by other evidence beyond a reasonable doubt that she was guilty. The court instructed the jury that the statements of Mravic were not binding on his codefendant and could not "be considered against her unless you are satisfied beyond a reasonable doubt that said *Marie Novkovic* assented to such statements actually or impliedly."

The errors assigned and argued are that the court was wrong (1) in refusing to grant *Mrs. Novkovic* a separate trial; (2) in permitting the jury to consider the confessions of Mravic as evidence against her; (3) in charging the jury; (4) in excluding competent evidence; (5) in not discharging the defendant *Novkovic;* and (6) in refusing a new trial, and in denying said defendant's motion in arrest of judgment.

The reasons assigned for granting a separate trial to *Mrs. Novkovic* were set forth in an affidavit which she filed in support of the motion, and were two in number. First, because she desired to call her codefendant as a witness in her behalf; and, second, because the confessions of Mravic which were competent evidence against him were not so as against her and would be highly prejudicial to her if permitted to go before the jury which tried her.

The right of two or more defendants jointly informed against to have separate trials is discussed in *Emery v. State*, 101 Wis. 627, 638, 78 N. W. 145. It is there said:

"Where persons are so circumstanced as to be properly triable together for a criminal offense, separate trials are not demandable as of right, except it be shown that a joint trial will so clearly be seriously prejudicial to one of the parties as to require a separate trial as to him to prevent injustice. The refusing or granting of such a motion is wholly within the dis-

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cretion of the trial court, and its exercise, as in other cases of the exercise of discretionary power, cannot be successfully questioned except for a plain abuse of it. That was the rule at common law, and though it has been changed in many jurisdictions by statute, it has not been changed in this state."

In discussing the right of one defendant to have the benefit of the testimony of the wife of a codefendant, the court further said:

"It may well be said, when the testimony of the wife of one defendant is material and reasonably necessary to the defense of a codefendant, that a severance should be granted on motion of the person seeking to obtain the benefit of such testimony, and that a denial of it is the denial of a right, because a fair exercise of judicial discretion would result in granting it; but in the absence of a clear showing that the evidence of the wife in the circumstances stated is necessary and material to the defense of a codefendant, the motion for a severance may properly be denied."

We do not think the trial court abused its discretion in refusing to grant a separate trial as to the defendant *Novkovic* because of her claim that Mravic was a material witness in her behalf and that she desired to use his testimony. Mravic had made two confessions, one of which was under oath, and in both of them he strongly implicated his codefendant. There was no showing that he had experienced a change of heart or that he would tell any different story, except a statement on information and belief made by *Mrs. Novkovic* in her affidavit. It was not shown that Mravic had ever made any statements different from those contained in his confessions or that he was willing to do so if called as a witness. As a matter of fact he declined to take the stand. Neither did the affidavit disclose the facts which plaintiff in error expected to prove by Mravic. All the court had before it was her mere conclusion, made on information and belief, that she could prove by Mravic that she was not guilty. We think the plaint-

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iff in error failed to make any sufficient showing that she was prejudiced by reason of being unable to use her codefendant as a witness.

The second point urged is that the confessions of Mravic, being competent testimony against him, were of such a nature as to be necessarily prejudicial to *Mrs. Novkovic,* and that a separate trial should have been granted for this reason. If these confessions were proper to go before the jury in case she was tried separately, no prejudice could result from trying her jointly with her codefendant. The trial court refused to charge the jury that Mravic's confessions were binding on him only and could not be considered in determining the guilt of his codefendant. This refusal is also assigned as error, and these two assignments will be considered together.

On behalf of the state it is contended that the confessions of Mravic were competent evidence against his codefendant on two grounds: First, because the defendants were co-conspirators and the declarations of one were admissible against the other; and, second, because the defendant *Novkovic* admitted the truth of the statements made by her codefendant, and in effect made his admissions hers.

It is clear that the first ground is not well taken. Where the design of a conspiracy is accomplished, no one of the conspirators by any act or declaration is permitted to affect the others engaged in it. *Miller v. State,* 139 Wis. 57, 88, 119 N. W. 850, and cases cited.

The trial court evidently was of the opinion that there had been *prima facie* proof that *Mrs. Novkovic* had admitted the truth of Mravic's confessions and thus made them her own. If this view was correct, such confessions were competent evidence against her.

We are unable to find any evidence in the record which shows that *Mrs. Novkovic* admitted that the statement made by Mravic before the chief of police was true in its entirety. We think the evidence is to the contrary. If Mravic's state-

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ment before the coroner was competent evidence against his codefendant, she was not prejudiced by the admission of the first confession, because there was no material difference between the two. The first confession went more into detail than the second, but the latter showed, if true, that the defendants had been criminally intimate before and after the murder; that *Mrs. Novkovic* had solicited her codefendant to kill her husband, and that on the night of the murder she suggested what she thought was the appropriate time for doing the act. These were the essential points covered by the first confession that tended to establish *Mrs. Novkovic's* guilt.

We have had some difficulty in satisfying ourselves that the evidence was sufficient to show *prima facie* that *Mrs. Novkovic* admitted the truth of the confession of Mravic before the coroner. The interpreter was not very familiar with the English language, and, while some of his evidence strongly tends to show such an admission, there is a good deal of it that is badly confused. The trial court had the benefit of seeing this witness on the stand, and it may be that what he intended to testify to was more apparent to one who listened to him than it is to one who must get his information from reading the interpreter's narrative. On the whole we are unable to say that the court was wrong in permitting the confessions of Mravic to be considered as evidence against his codefendant, particularly inasmuch as the jury was informed that the confessions must be disregarded as to *Mrs. Novkovic* unless the jury was satisfied beyond a reasonable doubt that she admitted their truth.

The court gave the following instructions to the jury:

"(2) In order that the statements and acts of the alleged conspirators in the execution of the common purpose can be properly considered on the question of the guilt or innocence of the accused, it is essential that the jury must first be satisfied by the evidence beyond a reasonable doubt that a conspiracy in fact existed between the said two defendants to kill and murder Steve Novkovic at the time and place charged."

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"(7) You are also instructed that the evidence of an accomplice is competent evidence in a criminal case upon which to base a verdict of guilty, provided it is of such a character, taken in connection with all the other evidence in the case, as to satisfy you of the guilt of the defendant beyond a reasonable doubt, but you should examine such evidence with the utmost care and caution, scrutinize it closely and weigh it in the light of all the attendant circumstances as shown by the whole evidence, and you should not base a verdict of guilty upon it alone unless after such scrutiny it satisfies you of the guilt of *Marie Novkovic* beyond a reasonable doubt."

The first of these instructions was wrong as applied to the facts in this case, under the decision in *Miller v. State,* 139 Wis. 57, 119 N. W. 850. The second would have been correct had Mravic testified as a witness on the trial. Not having testified, the instruction could only relate to the confessions which he made. These instructions standing alone might lead the jury to believe that the confessions of Mravic, if he were either a co-conspirator with his codefendant or an accomplice of hers, would be evidence properly admissible against her to establish her guilt. These instructions were general in form and did not direct the attention of the jury to any specific evidence in the case, and we think in view of the following instruction dealing directly with Mravic's confessions they did not prejudice the defendant:

"Certain statements made by the defendant Pajo Mravic having been admitted in evidence in this regard, you are instructed that they are not binding upon *Marie Novkovic* unless you are satisfied beyond a reasonable doubt that she acquiesced in them. The statements or confessions are binding only on the one making them unless assented to so as to become binding upon the other, and in passing upon this question you will give the defendant *Marie Novkovic* the benefit of any reasonable doubt you may have, and then if you are not satisfied that she assented to the statements made by Pajo Mravic before the chief of police and at the coroner's inquest you ought to dismiss them from your minds so far as the defendant *Marie Novkovic* is concerned and find her not guilty

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unless the remaining evidence satisfies you beyond a reasonable doubt that she is guilty of murder in the first degree."

Error is assigned because the court refused to give the following instruction:

"You are instructed that the concealment of a commission of a crime by telling a false story does not constitute the defendant *Marie Novkovic* a principal, nor does the fact of her being present, and you are instructed that merely being present and failing to endeavor to prevent a homicide, if such be the case, does not render her a principal."

It does not appear that any claim was made that the defendant's guilt would be established by proving that she concealed the crime and that she was present when it was committed. These were evidentiary matters which tended to establish her guilt and which might be properly considered by the jury in connection with other facts and circumstances. It is not necessary that a court should take up the different items of evidence relied on to establish the guilt of an accused person and say as to each particular item that it is insufficient in itself to prove guilt.

Error is also assigned because the court refused to give the following requested instruction:

"The defendant *Marie Novkovic* claims that she was not a party to the crime and that the sole responsibility of this homicide rests upon Pajo Mravic. She is entitled to the benefit of a reasonable doubt. You cannot find her guilty under this information of being an accessory before the fact. That charge has been withdrawn and the only offense here charged is murder in the first degree, and if you are not satisfied beyond a reasonable doubt that she was an active participant in the design and doing her part at the time in its furtherance, then, and in that event, you ought to find her not guilty."

The point made on the refusal to give this charge is that the defendant was entitled to have the jury instructed that she could not be convicted unless they were satisfied beyond

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a reasonable doubt that she was an active participant in the design to kill her husband and was doing her part at the time of the murder to further the commission of the crime. The instruction was misleading, in that the jury might infer therefrom that the defendant could not be convicted unless she assisted Mravic while he was delivering the blows that resulted in her husband's death. The court gave a substantially correct instruction covering the matter. After telling the jury what they must be satisfied of before convicting Mravic, the court proceeds:

"The next question for you to determine with reference to the defendant *Marie Novkovic* is, Was there in fact a conspiracy? Was she a member of such conspiracy? Did she conspire and confederate with her codefendant to commit or bring about such killing?"

"If you find from the evidence beyond a reasonable doubt that at the time and place charged the conspiracy mentioned in fact existed and that she, *Marie Novkovic,* was a member of such conspiracy and that she did in the language of the law conspire, confederate, and agree with said Pajo Mravic to commit said murder, then it will be your duty to find her guilty of murder in the first degree."

"Should you, however, entertain a reasonable doubt or fail to find beyond a reasonable doubt that a conspiracy in fact existed and that the said *Marie Novkovic* conspired, agreed, understood, combined, and confederated with said Pajo Mravic to commit said murder, then you will find the defendant *Marie Novkovic* not guilty."

There were found in Mravic's trunk two receipts, one for a ticket for the transportation of a Mrs. Mravic to this country, and another relating to the transportation of baggage, one being dated July 5, 1911, and the other on the day following. The defendant offered these papers in evidence and they were ruled out as immaterial. Error is assigned on this ruling. If they had any bearing on the case, it was so remote that no error was committed in rejecting the evidence.

By the Court.—The judgment of the municipal court of Milwaukee county is affirmed.

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1. The rule that the appellate tribunal acquires no jurisdiction if the tribunal whose act is sought to be reviewed had none, is to be applied with caution and discretion; and in any case no mere admission that proceedings are void can show that the tribunal below had no jurisdiction of the subject matter, for the same reason that no consent could confer such jurisdiction. *Schmidt v. Milwaukee,* 367

2. Thus, where the notice of appeal from an assessment by a board of public works of the damages to abutting property by reason of a change in the grade of a street stated generally that the proceedings were illegal and void, such statement, although assented to on behalf of the city, did not deprive the circuit court of jurisdiction of the appeal. Jurisdiction in such cases is dependent upon and governed wholly by the statute. *Ibid.*

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5. Sec. 3052*m*, Stats. (Laws of 1909, ch. 429), providing that an undertaking for costs on appeal "shall not be required if the judge . . . shall certify . . . that the party . . . is unable to furnish such bond or undertaking," leaves to the circuit judge the determination of a question of fact; and where the evidence is conflicting or the inferences of fact therefrom doubtful his conclusions will, on appeal, be treated with the same respect as findings of fact in the trial of cases. *State ex rel. Schultz v. Halsey,* 551

6. The trial judge, in such case, is not required to make the certificate merely upon the affidavits of the applicant, but may take into consideration the man's character, the extent of his acquaintance, and his probable ability to secure bondsmen. *Ibid.*

7. Where an application for a certificate that a party is unable to furnish an undertaking for costs, as provided in sec. 3052*m* (Laws of 1909, ch. 429), was made upon affidavits to the effect that he earned from $750 to $900 a year, that his entire income was consumed in the support of his family, that he had practically no property and no accumulated earnings, that he was unable to furnish any undertaking for costs to the amount of $250, and that he had no friend or relative who could or would act as surety for him, and there were counter affidavits, the duty of the trial judge was not so plain as matter of law as to justify issuing a writ of *mandamus* compelling him to issue such certificate. *Ibid.*

Perfecting defective record: Relief against mistakes.

8. Where an appeal to the supreme court has been properly taken, but the record is imperfect or defective, reasonable time will in general be given, upon reasonable terms, to cure all curable defects; counsel for the respective parties will be expected to co-operate in that regard without adversary motions, delays, or needless costs; and the court will, if necessary, act upon its own initiative to perfect the record sufficiently to enable it to decide an appeal upon the merits, or will so decide it regardless of mere informalities. *Colle v. Kewaunee, Green Bay & Western R. Co.* 96

9. Mistakes or inadvertences will not, in such a case, be permitted to deprive a party of the opportunity to have his case heard and determined on its merits and with as little delay as practicable; and all attempted interferences with such consideration of a disputed matter rightfully brought here will, unless founded on some substantial reason, be useless. *Ibid.*

10. The court will, however, endeavor to make relief from negligence or mistake subject to such terms as may be just and necessary to promote professional discipline and attention to the performance of duty. *Ibid.*

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11. A party cannot assign error upon the admission of evidence concerning irrelevant matters in respect to which he first gave testimony, or which was brought out by his counsel either as part of his own case or on cross-examination of witnesses for the adverse party. *Jennings v. Johonnott,* 660

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12. Sec. 2858*m*, Stats. (Laws of 1907, ch. 246), is not applicable to a matter which the trial court refused upon request to submit to the jury. *Habhegger v. King*, 1

13. Evidence included in numerous paragraphs designated as findings of fact by the trial court is merely surplusage and will be disregarded as findings, only the ultimate facts found being so considered. *Martin v. Board of Directors*, 19

14. Where by fair inference material evidentiary circumstances upon which there is a conflict of evidence are within the scope of the trial court's findings as made, they may properly be considered on appeal as if specifically found in conformity with the judgment. *Keilly v. Severson*, 251

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15. On appeal, as against an objection that the verdict is informal and does not cover all the material issues, where appellant did not at the trial request the submission of any question which would have cured the defect complained of, it will be presumed that the trial court found favorably to respondent on any material issue not passed on by the jury. *Rowlands v. Chicago & N. W. R. Co.* 51

16. The ordinary presumption, in case of a general verdict, that all questions of fact were resolved in favor of the successful party, cannot be indulged where the court directed the jury to find for the plaintiff and left to them only the assessment of the damages. *Hite v. Keene*, 207

17. Sec. 3070, Stats. (1898), which permits the supreme court to consider exceptions taken by the respondent in support of a judgment, does not, in general, apply to actions tried by a jury or, where some of the issues in an action are determined by the court, to that part of the action which is tried by the jury. *Ibid.*

Same: Findings when disturbed. See APPEAL, 5. CRIMINAL LAW, 13.

18. The clear preponderance of evidence which is required to warrant this court in disturbing the trial court's findings of fact must appear so manifestly from the record, after resolving all fair doubts in their favor and giving proper weight to the advantages of the trial court, as not to depend on a nice weighing of probabilities. *Keilly v. Severson*, 251

19. The superior advantages of a referee to judge of the credibility and weight of the evidence entitle his findings to peculiar force in a case where the evidence is vague, uncertain, and susceptible of conflicting constructions or applications. *Huntington v. Burdeau*, 263

20. Where there is a fair doubt as to whether a verdict is contrary to the evidence, the fact that the trial court approved it is of controlling weight. *Barlow v. Foster*, 613

21. A verdict approved by the trial court which has any credible evidence to support it will not be disturbed on appeal. *Ibid.*

22. Where there is any room for putting probability on one side against probability on the other, it cannot be said that a verdict is without any evidence to support it. *Ibid.*

23. Responsibility for the correct determination of questions of fact in legal actions rests upon the trial court and jury, not upon the supreme court. *Ibid.*

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24. Where no request was made to submit any question not embodied in the special verdict the losing party cannot, on appeal, complain that the material issues were not covered. *Ibid.*

25. On appeal to this court, no error will be deemed prejudicial or material unless it affirmatively appears that, had it not occurred, the result might probably have been materially more favorable to the party complaining. *Ibid.*

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27. An instruction not incorrect in law, though not applicable to any question submitted to the jury, is not ground for reversal unless it appears that the jury was misled or the appellant prejudiced thereby. *Ibid.*

28. The reception of evidence in rebuttal which should properly have been a part of the plaintiff's case in chief is not ground for reversal where defendant was not prejudiced thereby. *Yanike v. Chicago & N. W. R. Co.* 554

Subsequent appeals: Law of the case.

29. The decision of this court on a former appeal, that the question whether or not the gearing by which plaintiff's intestate was injured was securely guarded was one for the jury, is conclusive on a second trial, where the evidence for plaintiff is substantially the same, although additional contradictory evidence is given on behalf of the defendant. *West v. Bayfield M. Co.* 145

Determination and disposition of cause: Mandate on reversal. See DEEDS, 10. NEW TRIAL, 2. TRIAL, 8.

Appeal from county court: Allowance after time limited: Procedure.

30. Under sec. 4035, Stats. (1898), providing that after the time for appealing has expired no appeal from the county court shall be allowed by the circuit court without "reasonable notice" to the party adversely interested, it was not error in this case—a proceeding for construction of a will—to allow such an appeal to be taken on oral notice in court, other appeals in the same matter being then pending, all the parties being present and all except one consenting, the trial of the appeal being continued to a later date and not concluded for several months, and there being no showing of surprise or hardship. *Will of Stark,* 631

31. Notice of an appeal from the county court having been duly given although the required bond was not seasonably filed, and, after the filing of such bond, the circuit court having proceeded with the trial in all respects as if the appeal had been properly taken, it will be considered on appeal to the supreme court that the circuit court impliedly, if not expressly, approved of the procedure followed, and that the default in the timely filing of the bond was cured. *Ibid.*

Appeal from civil court of Milwaukee county.

32. Under subd. 3, sec. 28, ch. 549, Laws of 1909, judgments of the civil court of Milwaukee county are not to be reversed on appeal unless it affirmatively appears that manifest error in that

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court deprived the appellant of a fair trial, and that by reason thereof his rights cannot be protected and substantial justice done without a reversal of the judgment. *Eder v. Grifka*, 606

33. No such prejudicial error resulted where, after overruling a demurrer *ore tenus* to a complaint which failed to allege the necessary special circumstances to entitle plaintiff to recover for necessaries furnished to defendant's wife, the trial court proceeded with the trial and found, upon the evidence, that such special circumstances and conditions existed,—there being nothing in the record to show that defendant was surprised by the court's ruling or was unable to produce his evidence on those issues, or that he did not fully meet those issues with such evidence as he could command. *Ibid.*

34. Appeals to the circuit court from the civil court of Milwaukee county should be taken in the manner provided by ch. 160, Stats., relating to appeals from justices' courts; and the return of the clerk should contain the evidence taken upon the trial. *Ibid.*

35. Where, upon such an appeal, the return did not contain the evidence, but the judgment was affirmed by the circuit court upon the minutes of the clerk and the findings of the judge of the civil court, such findings will, upon an appeal to the supreme court, be presumed to have been sustained by the evidence. *Ibid.*

Appeal from district court of Milwaukee county. See MUNICIPAL CORPORATIONS, 3.

Appeal from justice's court. See JUSTICES' COURTS.

Appeal from board of public works. See MUNICIPAL CORPORATIONS, 7, 8.

APPLICATION OF PAYMENTS. See PAYMENT. PLEDGES, 5, 6.

ARGUMENTS OF COUNSEL. See TRIAL, 5, 6.

ARREST. See SHERIFFS.

ARSON.

Burning insured building: Evidence.

1. In a prosecution under sec. 4405, Stats. (1898), for wilfully burning insured property with intent to defraud the insurer, it is not essential to prove that the insurance was under a valid policy, if the insured believed it to be valid. *Smith v. State*, 63

2. The policy is admissible in evidence in such a case without proof that the insurance company was licensed to do business in this state. *Ibid.*

3. Oral testimony of the person who countersigned the policy as agent and delivered it, that he was the company's agent, was competent to show his authority in that regard. *Ibid.*

4. Failure by a foreign insurance company to comply with sec. 1945e, Stats. (1898),—forbidding the writing of policies except through agents duly authorized by the insurance commissioner,—does not relieve the company from liability upon its policies issued contrary to that statute. *Ibid.*

ASSESSMENTS. See INSURANCE, 1–4, 19, 20. MUNICIPAL CORPORATIONS, 5, 6, 8, 12, 13. TAXATION.

ASSIGNMENTS OF ERROR. See APPEAL, 11. TRIAL, 10, 17.

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ASSUMPTION OF RISK. See INSTRUCTIONS TO JURY, 4. MASTER AND SERVANT, 10, 11. RAILROADS, 3.

ATTORNEY AND CLIENT. See CRIMINAL LAW, 14–16. TRIAL, 5, 6.

AUTHORITY. See PRINCIPAL AND AGENT.

AUTOMOBILES.

See MASTER AND SERVANT, 16–18. PRINCIPAL AND AGENT.

Gross negligence in management: Instructions to jury.

1. In an action for death of plaintiff's intestate, alleged to have been caused by defendant's wanton and reckless driving of his automobile in which the deceased was riding, by reason of which the car ran into a ditch and was overturned, evidence, stated in the opinion, is *held* to sustain findings by the jury, approved by the trial court, to the effect that the defendant was not running the car at an unlawful rate of speed as he approached the place in question, and that he did not run it rashly, recklessly, or wantonly, and in disregard of the safety of others. *Barlow v. Foster*, 613
2. Instructions to the jury, with reference to the question whether the car approached the place at an unlawful speed, distinguishing between that period of time and a subsequent period, and stating that evidence as to a sudden speeding up of the car in the effort to keep it from skidding into the left-hand ditch had nothing to do with the question then under consideration, did not invade the province of the jury and were correct. *Ibid.*
3. The jury having acquitted defendant of running the car at an unlawful speed and of all the essentials of gross negligence, the question of proximate cause is immaterial and its submission to the jury not prejudicial. *Ibid.*
4. An instruction as to the meaning of the word "wilfully" in a question submitted to the jury, which was correct as far as it went but did not define the term as specifically as it might, was not prejudicially erroneous, in the absence of any request for more specific definition. *Ibid.*
5. Instructions, quoted in the opinion, as to the words "rashly, recklessly, or wantonly," are *held* to have correctly stated the law as to the meaning of these terms when used to characterize gross negligence. *Ibid.*
6. The mere running of the car at unlawful speed in such a case would be ordinary negligence, and would constitute gross negligence only when coupled with such wanton and reckless disregard of human safety as to evince intent, actual or constructive, to injure. *Ibid.*

BAIL.

See SHERIFFS.

1. Where the defendant in a criminal action gave his own personal recognizance and, his surety being unable to qualify, deposited $1,000 with the clerk of the court, who accepted the same in lieu of bail, the transaction constituted a deposit of money in lieu of sureties, under sec. 4816, Stats. (Supp. 1906: Laws of

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1901, ch. 104); and, the defendant having absconded, the deposit was properly forfeited and paid into the county treasury. *State v. Brown,* 572

2. Money so forfeited and paid into the county treasury in compliance with law cannot be recovered upon defendant's returning and entering a plea of guilty more than a year after the order of forfeiture was made. *Ibid.*

3. *It seems* that, had an application been made while the money remained under the control of the court, the court would have power to relieve from the forfeiture, although a year had elapsed. *Ibid.*

4. Although the money for a deposit by a defendant under said sec. 4816 is furnished by another person, it is considered as a deposit by the defendant himself, and no judgment need be entered against the person furnishing the money. *Ibid.*

BILL OF EXCEPTIONS. See MORTGAGES, 5.

BILLS AND NOTES.

Execution and delivery. See BROKERS, 1.

Rights and liabilities on indorsement or transfer: Holder in due course. See PLEDGES, 1, 4.

The evidence being sufficient to support a finding that plaintiff was a holder in due course of the promissory note in suit, and there being a presumption in support of the judgment (under sec. 2858*m*, Stats.: Laws of 1907, ch. 346) that the trial court so found, it is immaterial that, contrary to plaintiff's testimony that the person from whom he purchased the note had purchased it from the payee two days before the day it bore date, the jury found, in answer to the only question submitted to them, that the note was not executed until the day of its date. *Washburn v. Riemer,* 387

BOARD OF REVIEW. See TAXATION, 13, 14.

BONDS. See OFFICERS.

BOUNDARIES. See STATES.

BRIDGES.

Insufficiency: Personal injuries.

In an action to recover for injuries and consequent death caused by insufficiency of a bridge, a complaint which described the insufficiency as consisting of a three-inch plank nailed to the floor of said bridge diagonally across the bridge, so that when a team of horses was driven across the same the front wheels of the wagon would not strike the plank at the same time, is *held* sufficient on demurrer to admit evidence proper to be laid before the jury to establish an actionable case of insufficiency for want of repair. *Johnson v. Eau Claire,* 194

BROKERS.

See PARTNERSHIP, 4, 5.

1. Bought and sold notes, signed by brokers who are agents for both buyer and seller and containing the terms of sale, satisfy the statute of frauds and constitute a binding contract. *Pope Metals Co. v. Sadek,* 394

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2. Brokers acting for both parties to a sale of copper were authorized to insert in the contract specifications as to the particular brand and shape, where the insertion of such provisions by the broker was usual and customary in the trade. *Ibid.*

3. Where, in such a case, the seller, upon receiving from the brokers a telegram stating the terms of the sale, wired to a third person to deliver the copper, and also wired to the brokers that he had done so, he thereby ratified the sale upon the terms stated. *Ibid.*

BURDEN OF PROOF. See PLEDGES, 1. TAXATION, 5.

BURNING. See ARSON.

BY-LAWS. See INSURANCE, 15–18.

CEMETERIES. See RELIGIOUS SOCIETIES, 3, 4.

CHANGE OF GRADE. See APPEAL, 2. MUNICIPAL CORPORATIONS, 4–17.

CHANGE OF VENUE. See CRIMINAL LAW, 8.

CHARTERS. See CONSTITUTIONAL LAW, 4–11. MUNICIPAL CORPORATIONS, 4–6, 11.

CHATTEL MORTGAGES.

Requisites and validity. See CORPORATIONS, 2.

Same: Chattel mortgage or lease?

1. A written instrument, though containing formal words appropriate to a lease, is *held*, on the evidence, to have been a chattel mortgage or security for the payment of the purchase price of the articles described therein, rather than a lease. *Kiefer-Haessler Hardware Co. v. Paulus*, 453

Filing. See CORPORATIONS, 2.

2. A chattel mortgage given by partners, one of whom resides in a city and the other in a town, is not duly filed under sec. 2314, Stats. (1898), unless filed in the office of the city clerk and also in that of the town clerk. *First Nat. Bank v. Biederman*, 8

3. Under sec. 2313, Stats. (1898), if possession of the property is not delivered to the mortgagee, a chattel mortgage not filed as provided in sec. 2314 has no validity as against subsequent purchasers or mortgagees, even though they had actual notice of it. *Ibid.*

Tender of amount due: Effect.

4. When tender of the whole amount due under a chattel mortgage securing the purchase price of the articles described therein is made and kept good, the title passes to the purchaser. *Kiefer-Haessler Hardware Co. v. Paulus*, 453

CITIES. See CONSTITUTIONAL LAW, 4–11. MUNICIPAL CORPORATIONS.

CIVIL COURT OF MILWAUKEE COUNTY. See APPEAL, 32–35.

CLAIMS. See EXECUTORS AND ADMINISTRATORS, 5.

CLASSIFICATION. See JUDGES. TELEGRAPHS AND TELEPHONES, 3, 4.

CLOUD ON TITLE. See DEEDS, 1.

COMMERCE. See STATUTES, 2. TOWNS, 2, 3.

COMMERCIAL PAPER. See BILLS AND NOTES. BROKERS, 1. PLEDGES.

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COMPARATIVE NEGLIGENCE. See RAILROADS, 4–7.

COMPLAINT. See ABATEMENT AND REVIVAL, 2. APPEAL, 3, 4. BRIDGES. HUSBAND AND WIFE. MASTER AND SERVANT, 3.

COMPROMISE AND SETTLEMENT.

1. One who has received money or property in settlement of a disputed claim and given a release cannot maintain an action at law on the claim without rescinding the contract of settlement for some legal cause and returning or offering to return the consideration received. *Charron v. Northwestern F. Co.* 240
2. Where, at a time when an injured employee was incompetent to act, the employer secured a release signed by the employee's wife and by the employee himself with a mark, and turned over to the wife a check in settlement of the claim for the injury, and the wife used the proceeds of the check without her husband's knowledge or consent, the transaction constituted a voluntary payment to the wife without the husband's knowledge, rather than a settlement and release of the claim; and the rule above stated as to rescission is inapplicable. *Ibid.*

CONDITIONS.
Precedent. See MUNICIPAL CORPORATIONS, 23. PUBLIC UTILITIES, 7.
Subsequent. See DEEDS, 1–7.

CONFESSIONS. See CRIMINAL LAW, 9–12. INSTRUCTIONS TO JURY, 2.

CONSIDERATION. See EXECUTORS AND ADMINISTRATORS, 1, 3. MORTGAGES, 1, 3. PARENT AND CHILD, 2. TELEGRAPHS AND TELEPHONES, 7.

CONSPIRACY.

See CRIMINAL LAW, 11. INSTRUCTIONS TO JURY, 2, 8. INSURANCE, 10. SHERIFFS, 16.

1. In case of an action against one or more persons for damages for their having executed a conspiracy to do a wrongful act, the gist of the action is the damage. *Gebhardt v. Holmes*, 428
2. If there be no legal wrong in what is done by two or more persons acting in concert, in that if the wrong were done by one it would not be actionable, in general, it is not rendered actionable because of having been done by a combination. *Ibid.*
3. The foregoing is the rule where there is no substantive wrong in the combination itself. *Ibid.*
4. In case of a consummated combination to breach a contract, the wrong, giving rise to the legal right to damages, is the breaking of the agreement, not the combination. *Ibid.*
5. For a comprehensive rule:
   "An act legal in itself, in that it does not offend against the criminal law, and the injuries are *damnum absque injuria*, regardless of its violation of moral standards, whether such act be the one perpetrated or the means used to that end, generally, if not the subject of a civil action for damages when done by one person, is not if done by many acting in concert." *Ibid.*
6. Persons who combine to induce and assist a person to escape and who execute such purpose to the damage of the officer having him in custody, are liable to such officer for the pecuniary loss sustained by him. *Ibid.*

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CONSTITUTIONAL LAW.

Construction of constitutional provisions. See JUDGES.

Legislative powers. See INJUNCTION, 1, 2. INSURANCE, 11. JUDGES. PUBLIC UTILITIES, 4. TAXATION, 9.

Same: Delegation: "Home rule" act.

1. The fundamental law embodies those principles, some in form of declaration, others by way of implied or express prohibition, and some in the form of grant, supposed to be limitations essential to conserve human liberty, security, equality, and happiness, and not to be subject to change except in a way calculated to arouse the highest judgment and most efficient deliberate considerate choice. *State ex rel. Mueller v. Thompson,* 488

2. Each of the three distinct departments of government,—executive, legislative, and judicial,—is supreme in its sphere; outside thereof is usurpatious, and that of the judiciary includes power to dominate, efficiently, as regards marking the precise boundaries of each and remedying invasions by either of the territory of the other. *Ibid.*

3. The sole power to make law is lodged in the legislature with competency, however, to exercise it, by adopting an enactment, complete in itself, and prescribing the conditions under which it shall be vitalized, as by a vote of the people at large or those of a particular district, according to circumstances. *Ibid.*

4. The power to grant municipal charters is an attribute of sovereignty, exercisable, anciently, solely by the personal sovereign, then by his legislative body by his consent. Here the people succeeded to that prerogative power and, by the fundamental law, made the legislature the repository thereof. *Ibid.*

5. The power to make, change, or repeal municipal charters was legislative in character by the common law in force when the state was admitted into the Union and so expressly retained by sec. 13, art. XIV, in the general retention of our common-law system, as a whole, to remain in force till changed by the legislature in the constitutional way. *Ibid.*

6. Power of the legislature to change the common law, in force in this state when the constitution was adopted, is limited, respecting municipal charters, by sec. 1, art. XI, which, in form, grants thereto power to form municipal corporations, which, by necessary implication, includes power to grant municipal charters, fixing all fundamentals with reference to the special city government and prohibits exercise of such power otherwise, under the rule *Expressio unius exclusio alterius.* *Ibid.*

7. Sec. 32, art. IV, of the constitution commanding legislative provision for the transaction of any business, the doing of which by special legislation is prohibited by sec. 31 of such article, contemplates a legislative effort, in general, such as by the enactment of a law to be passive until made active by a vote of the people of any district authorized to act on the question,—not delegation of power to the people at large or of districts, or a district, according to circumstances, to do the business. *Ibid.*

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8. The idea embodied in sec. 31, art. IV, of the constitution, as to city charters, is that they shall be uniform throughout the state, as near as practicable, which would be violated by affording cities capacity to create want of uniformity by the exercise of authority, in severalty, to make, change, and repeal their charters. *Ibid.*

9. The power, in form, delegated by ch. 476, Laws of 1911, by the language, "Every city, in addition to the power now possessed, is hereby given authority to alter or amend its charter, or to adopt a new charter," is such dominating feature thereof as to render all others subsidiary thereto and dependable thereon. *Ibid.*

10. The power so, in form, delegated is one which was within the exclusive legislative field before the constitution and confined thereto thereby. *Ibid.*

11. The ruling feature of ch. 476, Laws of 1911, being unconstitutional, the others, forming an inseparable whole, take the cast thereof and fall therewith as invalid. *Ibid.*

Police power. See MUNICIPAL CORPORATIONS, 10–12.

Classification. See JUDGES. TELEGRAPHS AND TELEPHONES, 3, 4.

Uniformity of county government. See JUDGES, 6.

Uniformity of taxation. See JUDGES, 7.

Equal protection of laws. See TELEGRAPHS AND TELEPHONES, 4.

Due process of law. See TELEGRAPHS AND TELEPHONES, 4.

CONSTRUCTIVE FRAUD. See EXECUTORS AND ADMINISTRATORS, 6–10.

CONSTRUCTIVE NOTICE. See DEEDS, 6. PARTNERSHIP, 4.

CONTRACTS.

Requisites and validity. See BROKERS, 1, 2. CHATTEL MORTGAGES, 1. CORPORATIONS, 1. EVIDENCE, 3. EXECUTORS AND ADMINISTRATORS, 1–5. FRAUDS, STATUTE OF. INSURANCE, 15, 18. MORTGAGES, 1, 2. PARTNERSHIP, 1, 2, 4, 5. PUBLIC UTILITIES. SHERIFFS, 13, 14, 16. TELEGRAPHS AND TELEPHONES, 5–7. TOWNS.

Consideration. See EXECUTORS AND ADMINISTRATORS, 1, 3. MORTGAGES, 1, 3. PARENT AND CHILD, 2. TELEGRAPHS AND TELEPHONES, 7.

Construction. See BROKERS, 3. CORPORATIONS, 2. INSURANCE, 19, 20. LOGS AND LOGGING. OFFICERS. PARENT AND CHILD, 1. PATENTS, 2–6. RELEASE.

1. There is nothing inconsistent in a contract which creates an agency to sell and also gives the agent himself an option to purchase which he may, but is not bound to, avail himself of at any time during his agency. *Shepard v. Pabst,* 35

2. The legal name which the parties to a contract give to their acts or instruments is not controlling in interpretation. The real, substantial nature of the legal relation thereby created will control, and the meaning of the contract is to be ascertained from a survey of the whole instrument, all parts thereof being harmonized if that can be done. *Ibid.*

3. The mere execution by the vendor of land of an option contract thereon does not *per se* constitute the holder his agent, and he will not be bound by any fraud or misrepresentation by such

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holder inducing a sale to a second purchaser, if the contract is only what it purports to be and was not intended merely as a form of agency; and the rule is the same although it is contemplated that the contract may be assigned. *Ibid.*

4. In an action to recover damages, based on misrepresentations by which plaintiffs were induced to purchase lands of the defendant, a contract relating to the lands in question and others (the provisions of which are fully stated in the opinion), between defendant and a corporation which is alleged to have made the false representations to plaintiffs, is *held* not to have been a contract of sale nor a mere option contract, but to have created a selling agency in such corporation, with an option on the part of the agent to purchase any or all of the lands at any time up to the termination of such agency; and defendant is responsible, therefore, for fraud of his agent. *Ibid.*

5. Where a purchase of land is induced by the fraud of the vendor's agent in pointing out other land as that offered for sale, the vendor is not relieved of liability for such act of the agent by a clause in the sale contract to the effect that the purchasers agree and warrant, as part of the consideration for the sale to them, tnat they have inspected the premises and that they are not relying upon any representation made by the vendor or any agent, and that they explicitly waive any claim on that account. In such a case the agent's fraud avoids the assent to such a clause as well as to the other recitals and stipulations of the contract which the purchaser signs under the influence of such misrepresentation. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See HIGHWAYS, 2. INSTRUCTIONS TO JURY, 3, 4. MASTER AND SERVANT, 10, 13, 15. RAILROADS, 3. STREET RAILWAYS, 3.

CORPORATIONS.

Incorporation: De facto officers.

1. Although a corporation never became legally authorized to elect officers or to transact business with any others than its members, transfers of the corporate property to a stockholder as security for the repayment of moneys advanced by him to *de facto* officers for corporate uses are *held* to be valid transfers, the *de facto* officers who made them in the name of the corporation having been carrying on its business in an informal way with the knowledge and consent of all the other stockholders, and no rights being involved other than those of persons who had consented, either expressly or impliedly, to everything that was done. *Peyton v. Minong Lumber & Lath Co.* 66

2. Sawmill property of a lumber company was leased to one C., who agreed to manufacture into lumber a quantity of logs belonging to the company under the supervision and control of one P., who was to pay the expenses of manufacture. The logs were conveyed to P. as security for the company's indebtedness to him, and he was authorized to sell the lumber and, after paying the expense of manufacture and the indebtedness to him, to return any surplus to the company. *Held*, that delivery of the logs to C. under the agreement was a delivery to P., and C.'s possession during the process of manufacture was actual possession by P., so that the agreement, though never

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filed, was a valid chattel mortgage as against a subsequent execution levy. *Ibid.*

By-laws. See INSURANCE, 15–18.

Officers: Amotion. See COSTS, 3.

3. Every corporation has at common law, as incident to its existence, the power of amotion. Generally this power is to be exercised only for cause and after notice and hearing, but the statute, or the articles where the statute does not forbid, may provide otherwise. *Wolf v. G. U. G. Germania,* 576

4. Where officers of a mutual benefit society, acting in good faith for what they deemed to be the best interests of the society, and under the advice of counsel, attempted to remove certain subordinate officers, but in so doing proceeded irregularly, without notice or hearing, they should not be required to repay to the society moneys expended by them out of the corporate funds for attorneys' fees and other necessary expenses in unsuccessfully defending an action by the officers so removed to compel reinstatement. *Ibid.*

Ultra vires. See PUBLIC UTILITIES.

Foreign corporations. See ARSON, 4. TOWNS, 2, 3.

COSTS.

Persons entitled.

1. Where the plaintiff in an equitable action demands costs and the court concludes and orders that the plaintiff is entitled to the relief demanded, he is entitled to judgment for costs without any further or more specific direction by the court. *Radford v. Smith,* 163

2. Where the only prejudicial error in a judgment was a mistake in amount, which would obviously have been corrected upon request and without any appeal, no costs should be allowed to appellant in the supreme court. *Ibid.*

3. In an action against a corporation and its officers to enjoin a wrongful diversion of corporate funds and to recover moneys improperly paid out, judgment having gone in favor of the plaintiffs and the trial court in its discretion having awarded costs against such officers individually, the supreme court on appeal declines to review such discretion. *Wolf v. G. U. G. Germania,* 576

Security for payment. See APPEAL, 5–7.

COUNTERCLAIM. See PLEADING, 1, 2. TAXATION, 12.

COUNTIES. See OFFICERS, 4, 5.

COUNTY COURTS. See APPEAL, 30, 31. EXECUTORS AND ADMINISTRATORS.

COUNTY GOVERNMENT: Uniformity. See JUDGES, 6.

COURT COMMISSIONERS. See INJUNCTION, 2.

COURTS.

Jurisdiction. See APPEAL, 1, 2.

Supreme court: Superintending control of inferior courts.

In order to justify the exercise of the superintending control of the supreme court, the duty of the inferior court must be plain,

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its refusal to proceed in the performance of that duty clear, the results of such refusal prejudicial, the remedy by appeal or writ of error utterly inadequate, and the application to the supreme court for relief prompt. *State ex rel. Schultz v. Halsey*, 551

County courts. See APPEAL, 30, 31. EXECUTORS AND ADMINISTRATORS.

Civil court of Milwaukee county. See APPEAL, 32–35.

District court of Milwaukee county. See MUNICIPAL CORPORATIONS, 3.

Justices' courts. See JUSTICES' COURTS.

Court commissioners. See INJUNCTION, 2.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See ARSON. HOMICIDE. MUNICIPAL CORPORATIONS, 1–3.

Commitment. See BAIL.

Evidence: Other offenses: Previous acts and threats.

1. As a general rule, it is not competent in a prosecution for one crime to introduce evidence of other offenses; but where such other offenses directly tend to prove some material element of the crime under investigation, such as guilty knowledge or some specific intent, they may be shown. *Dietz v. State*, 462
2. Upon a prosecution for the murder, by shooting, of a deputy sheriff who, in an attempt to arrest the defendant under criminal warrants, had with other deputies, armed with rifles, surrounded and laid siege to defendant's home in a clearing in the woods, it was competent for the state, in order to negative any claim that defendant acted in a good-faith defense of his home and family from attack by persons who appeared to be wrongdoers, and to establish that he had the criminal intent necessary to constitute murder, to show that he had frequently and uniformly during the preceding years made armed resistance to arrest and had threatened to shoot the officers on sight and that he would never be taken alive. *Ibid.*
3. The fact that some of the acts of resistance to arrest were remote in point of time did not, of itself, render such evidence incompetent, especially where such acts were repeated year after year down to a recent time and were all apparently inspired by the one purpose to resist the execution of legal process. *Ibid.*
4. The evidence of defendant's previous acts and threats was admissible also to explain and justify the extraordinary display of force in the attempt to arrest him on the occasion in question. *Ibid.*
5. Such evidence was not confined in its probative effect to the question of defendant's intent, but was admissible generally because it tended to prove a general design or system of which the shooting of the deputy on this occasion was simply an integral part necessary to the successful consummation of the design or system. *Ibid.*
6. Evidence that a loaded set gun and large bear traps were found at places where officers were likely to approach defendant's house, was admissible as tending to show preparation or design to make forcible and deadly resistance to arrest. *Ibid.*

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7. A criminal warrant upon which the officers were endeavoring to arrest the defendant at the time of the shooting in question was properly received in evidence to justify their armed approach to defendant's home. *Ibid.*

Same: Confessions of conspirators. See CRIMINAL LAW, 10–13.

Change of venue: Calling in another judge.

8. The calling in of a judge of an adjoining circuit to try a case in which an affidavit of prejudice has been filed against the presiding judge, is a change of venue within the meaning of sec. 4680, Stats. (1898), providing that not more than one change of venue shall be awarded in any cause. *Dietz v. State,* 462

Separate trials: Discretion: Conspirators: Confessions.

9. There was no abuse of discretion in denying an application by one of two defendants jointly charged with murder, for a separate trial on the ground that she desired to call her codefendant as a witness, where, previous to the trial, such codefendant had made two confessions in both of which he implicated her, and there was no showing that he had changed his attitude or had made any different statements or was willing to, but merely the affidavit of the moving party, made on information and belief, that she could prove by him that she was not guilty; and where upon the trial such codefendant declined to take the stand. *Novkovic v. State,* 665

10. Where such application was also based on the ground that the confessions of the codefendant were calculated to prejudice her upon a joint trial, it was not error to deny it if such confessions were proper to go before the jury in case she were tried separately. *Ibid.*

11. The mere fact that defendants jointly charged with murder were co-conspirators in the crime, does not render the confession of one admissible against the others. *Ibid.*

12. Upon *prima facie* proof that one of two codefendants admitted the truth of a confession made by the other, such confession becomes competent evidence against the former. *Ibid.*

13. The trial court having had the advantage of seeing the witnesses on the stand and hearing them testify, its decision to admit the confession of one defendant as evidence against his codefendant is sustained notwithstanding the written testimony is not clear,—particularly in view of the fact that the jury was instructed to disregard such confession unless satisfied beyond a reasonable doubt that its truth was admitted by the codefendant. *Ibid.*

Right of accused to try his own case. Appointment of attorney.

14. Every person *sui juris* who is charged with crime has the right to try his own case if he so desires, and the court would not be justified in imposing counsel upon him against his will. *Dietz v. State,* 462

15. At the opening of a trial for murder, defendant stated that although he was able to employ an attorney and had had many applications for the position he preferred and intended to try the case without any attorney. There was nothing to indicate any lack of mental competency on his part, and in fact he managed his case with shrewdness and with knowledge and active assertion of his substantial rights, making due and timely ob-

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jections to evidence and addressing the jury with fluency and force. He secured the acquittal of other members of his family who were tried with him, but was himself convicted upon ample evidence of his guilt. *Held*, that there was no error in failing to appoint an attorney to defend him. *Ibid.*

Instructions to jury. See INSTRUCTIONS TO JURY, 5.

16. The rule that, in the absence of any request by the defendant, failure to charge the jury as to certain matters or omission to submit certain degrees of crime is not error, is not strictly applied in this case, defendant having tried his own case without the assistance of an attorney. *Dietz v. State*, 462

DAMAGES.

Grounds and subjects of compensatory damages. See ACTION, 1. INSTRUCTIONS TO JURY, 6. LOGS AND LOGGING. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 4, 8–10, 12, 13, 15, 16. NEGLIGENCE. SHERIFFS.

Exemplary damages. See MUNICIPAL CORPORATIONS, 21.

1. The allowance of punitory damages is never a matter of right but, even where the proper elements are found to exist, rests in the sound discretion of the jury. *Di Benedetto v. Milwaukee E. R. & L. Co.* 566

Measure of damages. See ABATEMENT AND REVIVAL, 4, 5. EXECUTORS AND ADMINISTRATORS, 3. MUNICIPAL CORPORATIONS, 15, 16.

2. In an action brought for the benefit of a widow to recover for the death of her husband, the damages are limited to the pecuniary loss to the widow, and that loss is to be measured by the reasonable value of her support and protection during the probable lifetime of the deceased and such sum as she might reasonably expect to receive at his death out of the accumulations which he might probably make. *West v. Bayfield Mill Co.* 145

3. As a general rule, in actions for breach of executory contracts of sale the damages are the difference between the contract price and the market price at the time and place fixed by the contract for delivery, with interest from the time of the breach. *Pope Metals Co. v. Sadek*, 394

4. Upon breach of a contract for sale of copper to be delivered at a recognized world market, the principle that the buyer is bound to exercise reasonable diligence to minimize the damages did not necessarily and as matter of law require him to accept delivery, with an equalization of freight, at another place at which there was no recognized market. *Ibid.*

5. Upon the cause of action which vested in an injured person who lived for an appreciable time after the injury, the damages recoverable are limited to those which he sustained in his lifetime; while the damages accruing to the widow or other relative by reason of his death are limited to the pecuniary loss by reason of such death, and hence accruing subsequent thereto. *Tidmarsh v. Chicago, M. & St. P. R. Co.* 590

Excessive damages. See TRIAL, 1.

6. An award of $8,700 is *held* not excessive for an injury to a locomotive fireman twenty-eight years of age and earning $125 a month, where his skull was fractured for a length of four and

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one-half inches, he was wholly incapacitated for labor for a year, and the evidence tended to show that the injury was permanent, at least without an operation the benefit from which would be uncertain. *Rowlands v. Chicago & N. W. R. Co.* 51

7. For the death of a laboring man fifty-three years of age, whose earnings did not exceed $500 per year and who had accumulated nothing at the time of his death, an award of $7,500, reduced by the trial court to $6,600, was still too large, and the judgment is accordingly reversed, with the option to plaintiff to remit all in excess of $4,750, the amount awarded by the jury on a former trial. *West v. Bayfield Mill Co.* 145

DAMS. See STATES, 3. WATERS AND WATERCOURSES, 5–7.

DEATH. See ABATEMENT AND REVIVAL. ACTION, 2. APPEAL, 29. AUTOMOBILES, 1. BRIDGES. DAMAGES, 2, 5, 7. DEEDS, 2. INSTRUCTIONS TO JURY, 3, 4. MUNICIPAL CORPORATIONS, 23–25. NEGLIGENCE, 2. TRIAL, 3, 14.

DEBTOR AND CREDITOR. See BILLS AND NOTES. BROKERS. CHATTEL MORTGAGES. COMPROMISE AND SETTLEMENT. CONTRACTS. DAMAGES, 2–5. DEEDS, 6. EXECUTORS AND ADMINISTRATORS. FRAUD. FRAUDS, STATUTE OF. GIFTS. LANDLORD AND TENANT. LIMITATION OF ACTIONS. LOGS AND LOGGING. MORTGAGES. OFFICERS. PARTNERSHIP. RELEASE.

DEEDS.

Construction and operation: Conditions subsequent: Breach: Re-entry.

1. A grantor of land who has re-entered and is in actual possession thereof after breach of a condition subsequent may maintain an action in equity to set aside the conveyance as a cloud on his title, and need not sue in ejectment. *Lowrey v. Finkleston,* 222

2. Where a conveyance and lease were made subject to the performance by the grantee and lessee of an agreement to make certain payments and render certain services, some of which were of a personal nature and founded in the close relations existing between the parties, his death in the lifetime of the grantor and prior to full performance of such personal services entitled the grantor to treat the condition as broken, and she was not bound to carry out the contract with his legal successors. *Ibid.*

3. The words "heirs, executors, administrators, and assigns" in the *habendum* clause of the deed and lease would not alter the case, where no such words appear in the condition. *Ibid.*

4. Where a substantial part of the agreement upon which a conveyance and lease are made is the performance of certain services to the grantor during her natural life, and the instruments provide that upon a failure of performance at any time the grantor may declare the same void and may enter upon and repossess the premises, the agreement will be treated in equity as a condition subsequent, and, if substantially broken through failure of the grantee to perform, the conveyance and lease will be set aside. *Ibid.*

5. In such a case equity takes jurisdiction, not to forfeit a title, but to quiet a title already forfeited for breach of the condition. *Ibid.*

6. Where a conveyance containing a condition subsequent is duly recorded, such record is constructive notice to a subsequent

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mortgagee of the premises, who can acquire no greater rights than the grantee; and the same is true of creditors of the grantee. *Ibid.*

7. Where a grantee of land subject to an agreement constituting a condition subsequent, a substantial part of which was the rendition of personal services, mortgaged the land and thereafter died insolvent, and his administratrix and heirs surrendered the land to the grantor, the mortgagee was entitled in equity to an accounting and to have a lien upon the land for the excess, if any, of moneys paid and articles furnished by such grantee, over the rental value of the land, together with interest on the amount of such excess paid each year from the time of payment to the date of the judgment. *Ibid.*

8. Under the facts and circumstances of this case, such mortgagee was also entitled to an equitable lien for the amount of the dividend she would have received had she filed her claim against the mortgagor's estate, she having declined to file such claim in the belief that her mortgage was valid. *Ibid.*

9. The fact that the amounts expended by the grantee of the land were paid out in the performance of his agreement would not bar his estate from being allowed therefor in an equitable accounting, since by the grantee's death the grantor became entitled to a rescission and restoration to her former rights. *Morgan v. Loomis*, 78 Wis. 594, distinguished. *Ibid.*

10. Upon appeal in such a case, this court, being unable to ascertain with accuracy from the record the amount of the excess of annual payments over the rental value, or the amount due upon the mortgage at the time of judgment, remands the case for a statement of the account by the trial court in accordance with the opinion of this court, to the end that, if necessary, additional testimony may be taken. *Ibid.*

Same: Reservation or exception?

11. The words "excepting" and "reserving" in deeds are often used indiscriminately and interchangeably, and sometimes what purports to be a reservation has the force of an exception, the technical meaning giving way to the manifest intention of the parties. *Jones v. Hoffman*, 30

12. In a deed conveying forty acres of land, a clause "reserving off the east line of the same two rods in width, running into Pewaukee lake, commencing two rods south of the northwest corner of section 24," followed immediately by a reservation of a right of way over another strip to be used by the parties in common, is *held*, in view of the physical situation and surrounding circumstances, to have excepted the strip first mentioned from the grant. *Ibid.*

13. Language used in subsequent conveyances from the grantee in said deed, referring to said first mentioned strip as a right of way, could not enlarge the estate granted to him by such deed. *Ibid.*

DELIVERY. See DAMAGES, 3, 4.

DEMURRER. See APPEAL, 3, 4, 33. BRIDGES.

DEPOSIT in lieu of bail. See BAIL, 1, 4.

DILIGENCE. See NEW TRIAL, 3, 4.

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DIRECTORY STATUTES. See NEW TRIAL, 5.

DISCRETION. See CRIMINAL LAW, 9. DAMAGES, 1. NEW TRIAL, 1. TRIAL, 4, 15.

DISCRIMINATION. See PUBLIC UTILITIES.

DIVERSION of funds. See INSURANCE, 20. RELIGIOUS SOCIETIES, 1.

DIVORCE.

Limited divorce from bed and board: Judgment: Interlocutory or final?

1. Actions for divorce are purely statutory, and only such judgments may be entered therein as are authorized by statute. *Graham v. Graham,* 602
2. Except in so far as revocation is expressly provided for in secs. 2370, 2375, Stats. (1898), that part of a divorce judgment which grants the divorce is no more to be altered, revised, or set aside after the term at which it is rendered than any other judgment of a court of record. *Ibid.*
3. A judgment of divorce from bed and board for a limited time, granted on the ground that the defendant wife was given to intoxication, and providing that at the end of such time either party "may proceed in the action as he or she shall deem for his or her best interest," was not an interlocutory judgment authorized by sec. 2883, Stats. (1898), but a final judgment; and there was no jurisdiction or authority at the end of the time limited to enter a judgment of absolute divorce, even though the trial court intended by the first judgment to reserve the right to grant an absolute divorce upon the record as it stood at that time, in case the parties should not reunite during the period limited. *Ibid.*
4. There was in such case no "condition to be performed," within the meaning of said sec. 2883, Stats. (1898). *Lamberton v. Lamberton,* 125 Wis. 616, distinguished. *Ibid.*

DRAINS.

Corporations owning land in a proposed drainage district are "adult owners" of such lands within the meaning of sec. 1379—11, Stats. (Supp. 1906: Laws of 1905, ch. 419), and as such may petition for the organization of the district. *Jordan Land Co. v. Freeborn,* 159

DUE PROCESS OF LAW. See TELEGRAPHS AND TELEPHONES, 4.

EJECTMENT. See DEEDS, 1. WATERS AND WATERCOURSES, 3, 4.

ENCROACHMENTS. See MUNICIPAL CORPORATIONS, 18–22.

EQUAL PROTECTION OF LAWS. See TELEGRAPHS AND TELEPHONES, 4.

EQUITABLE CONVERSION. See WILLS, 8.

EQUITABLE LIENS. See DEEDS, 8.

EQUITY.

Jurisdiction. See DEEDS, 1, 5, 6. EXECUTORS AND ADMINISTRATORS, 7–9. INJUNCTION, 2. INSURANCE, 6. PARTNERSHIP, 1, 2.

1. Equity opens its doors whenever necessary to prevent fraud and injustice and where the relief asked conforms with principles

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of rectitude and honesty; but there is no inflexible rule requiring that the suitor shall himself be wholly without fault. *Keilly v. Severson,* 251

Laches.

2. An action to have it adjudged that plaintiff had an undivided interest in land, the title to which had been taken in defendant's name, was properly held to be barred by plaintiff's laches, on the facts stated in the opinion. *Russell v. Fish,* 122

ESCAPE. See CONSPIRACY, 6. SHERIFFS, 9–12, 15–18.

ESTOPPEL. See INSURANCE, 8, 9. JUSTICES' COURTS, 3. LANDLORD AND TENANT. PATENTS, 4. PUBLIC UTILITIES, 6.

EVIDENCE.

Change of rules by legislature: Pending actions. See INSURANCE, 11.

Judicial notice. See STATUTES, 1.

Presumptions. See APPEAL, 15–17, 35. BILLS AND NOTES. MASTER AND SERVANT, 11. WILLS, 1.

Burden of proof. See PLEDGES, 1. TAXATION, 5.

Relevancy, materiality, and competency. See ARSON, 3. CRIMINAL LAW, 1–7, 9–13. EVIDENCE. EXECUTORS AND ADMINISTRATORS, 4. STATUTES, 7.

Res gestæ.

1. Where plaintiff fell and was injured in attempting to alight from a street car, questions addressed to her by the motorman after he had stopped the car and come back to her, as to why she got off while the car was going and why she didn't ring the bell, and her response thereto, were a part of the *res gestæ,* so that evidence thereof was admissible on behalf of the street railway company. *Cohodes v. Menominee & M. L. & T. Co.* 308

2. But the motorman and another witness having testified as to such questions and response, exclusion of the testimony of a third witness to the same effect was not prejudicial error. *Ibid.*

Admissions. See MUNICIPAL CORPORATIONS, 25. TOWNS, 1.

Parol evidence affecting writings.

3. Parol evidence is competent to show that a written contract apparently valid on its face was in fact made in contravention of a statute and for the purpose of evading its effect. *Kilbourn City v. Southern Wis. Power Co.* 168

Opinion evidence: Subjects of expert testimony: Effect. See MUNICIPAL CORPORATIONS, 17.

4. In an action for libel which involved the meaning of the words "*fait précis*" in Swiss law (translated "precise fact" or "definite act"), expert testimony was admissible to show such meaning. *Hite v. Keene,* 207

5. In such case it was not error to submit to experts in Swiss law certain letters containing the alleged libelous matter and to ask them whether such letters contained any averment of a "precise fact" or of a "definite act" within the meaning of the Swiss Penal Code, instead of interrogating them by hypothetical questions. *Ibid.*

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6. There is an inherent weakness in the testimony of legal experts, as to the interpretation to be placed on a foreign statute, which does not claim to be based on any decisions of the courts of the foreign country. *Ibid.*

7. Such testimony, when competent, is not conclusive on court or jury, as the case may be, even though undisputed. *Ibid.*

Weight and sufficiency. See ARSON, 1, 3. AUTOMOBILES, 1. BILLS AND NOTES. CHATTEL MORTGAGES, 1. CRIMINAL LAW, 5. EVIDENCE, 7. EXECUTORS AND ADMINISTRATORS, 4, 8. HIGHWAYS, 1. HOMICIDE. MASTER AND SERVANT, 3, 4, 6. PUBLIC UTILITIES, 1. RAILROADS, 1, 2, 4. RELIGIOUS SOCIETIES, 3, 4. STATUTES, 6. STREET RAILWAYS, 2. TAXATION, 14. TELEGRAPHS AND TELEPHONES, 1. WILLS, 1, 2.

EXCEPTIONS. See APPEAL, 4, 17. DEEDS, 11–13.

EXCEPTIONS, BILL OF. See MORTGAGES, 5.

EXCESSIVE DAMAGES. See DAMAGES, 6, 7. TRIAL, 1.

EXECUTIVE POWERS. See CONSTITUTIONAL LAW, 2.

EXECUTORS AND ADMINISTRATORS.

Allowance and payment of claims: Oral promise to pay for services by legacy: Breach: Measuring damages. See TAXATION, 6, 7, 10.

1. An oral promise, accepted by the promisee, to compensate by a legacy services previously performed for the promisor by one not a member of his family, is based upon a sufficient consideration and is valid and binding. *Murtha v. Donohoo,* 481

2. Such an agreement is deemed a new and substitutionary contract, not within the purview of sec. 4243, Stats. (1898), and not affected by subsequent expiration of the time within which an action upon the original liability to pay for the services must have been brought had such liability continued. *Ibid.*

3. Where the promise to compensate by a legacy is based upon a past or executed consideration, such as services previously performed and moneys paid out at the request of the promisor, the amount recoverable for a breach thereof is measured by the reasonable value of the services performed and the amount of the moneys so paid, with interest at the legal rate. *Ibid.*

4. The amount agreed to be paid by legacy in such a case may be proved as having some evidential bearing on the reasonable value of the services where the disparity is not too great, but is not conclusive. *Ibid.*

Same: Limitation of actions: Pleading.

5. With reference to a claim against the estate of a decedent the statute of limitations must always be considered although not pleaded. *Murtha v. Donohoo,* 481

Sales of real estate under order of court: Purchase by administrator.

6. A sale of real estate of a decedent by an administrator, if the latter is directly or indirectly interested therein, is constructively fraudulent under sec. 3914, Stats. (1898), regardless of whether there was any bad intent or actual injury to any one the statute was designed to protect. *Keilly v. Severson,* 251

7. But the word "void," as used in said sec. 3914, means voidable; and the purchaser at a sale made in violation of that section is

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vested with the legal title, and can be divested thereof only in a proper action brought within a proper time by a person entitled to challenge the validity of the sale. *Ibid.*

8. A widow who, to retain the home for herself and children, procured her brother to become purchaser of the land in question at the sale thereof by herself as administratrix, under an agreement that he should convey to her, and who paid the purchase price herself to the estate and was allowed by the brother to remain in peaceable possession, paying taxes and treating the property as her own for a period of fourteen years, at the end of which time he repudiated the agreement and conveyed to a third person who brought ejectment, is *held* entitled to equitable relief and to a conveyance from such grantee, notwithstanding her own violation of law in respect to the sale. *Ibid.*

9. Under the facts stated, the case is not one where the consideration was paid by one person and title taken in the name of another and a resulting trust is sought to be established, nor one in which relief is asked by the defendant upon the ground of the invalidity of the sale made in violation of sec. 3914, Stats. (1898), but stands upon the same footing in equity as if there had been an oral contract of sale to the defendant after the administratrix's sale, which, after the lapse of time and under the circumstances of part performance, is enforceable under general principles of equity jurisprudence. *Ibid.*

10. Ratification of a transaction may relate back or have effect *in præsenti* according to the equities of the particular situation. *Ibid.*

Actions. See ABATEMENT AND REVIVAL, 2, 4.

EXEMPLARY DAMAGES. See DAMAGES, 1. MUNICIPAL CORPORATIONS, 21.

EXEMPTIONS. See TAXATION, 2.

EXPERT TESTIMONY. See EVIDENCE, 4–7. MUNICIPAL CORPORATIONS, 17.

FALSE REPRESENTATIONS. See CONTRACTS, 3–5. FRAUD.

FEDERAL STATUTES. See STATUTES, 1–3.

FELLOW-SERVANTS. See MASTER AND SERVANT, 14.

FENCES. See MUNICIPAL CORPORATIONS, 20, 21.

FILING. See CHATTEL MORTGAGES, 2, 3. CORPORATIONS, 2.

FISH AND GAME. See STATES, 1.

FLOWAGE. See WATERS AND WATERCOURSES, 7.

FORECLOSURE. See MORTGAGES, 3–7. PLEADING, 2.

FOREIGN CORPORATIONS. See ARSON, 4. TOWNS, 2, 3.

FOREIGN LAWS. See EVIDENCE, 4–7. STATUTES, 1, 7. TRIAL, 7.

FORFEITURE. See BAIL, 1–3. DEEDS, 5. INSURANCE, 3, 4, 10–14.

FRANCHISES. See TELEGRAPHS AND TELEPHONES, 5–7.

FRAUD.

See CONTRACTS, 3–5. EXECUTORS AND ADMINISTRATORS, 6–10. GIFTS, 1. INJUNCTION, 5. INSURANCE, 10. WITNESSES, 1.

1. A false representation must be relied and acted upon in order to be actionable. *Francois v. Cady Land Co.* 115

2. Statements as to the value of property about to be sold, where inspection is open to the buyer, are ordinarily regarded as mere

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expressions of opinion, and will not be regarded as statements of fact on which actionable fraud can be based, in the absence of extrinsic circumstances, like fiduciary relations or artifice, by which the buyer is prevented from making investigation himself. *Ibid.*

FRAUDS, STATUTE OF.

See BROKERS, 1. MORTGAGES, 1. PARTNERSHIP, 1, 2.

A contract by which the vendor of a note and mortgage executed by a third person guarantees payment thereof is a contract to answer for the debt, default, or miscarriage of another, and is void, under sec. 2307, Stats. (1898), if not in writing. *Francois v. Cady Land Co.* 115

FRAUDULENT REPRESENTATIONS. See FRAUD.

GIFTS.

Inter vivos.

1. During the last year of his life a testator, by whose will his estate of about $112,000 was divided equally between his wife and daughter, had given to the divorced husband of the daughter about $18,000. Evidence, stated in the opinion, is *held* to sustain findings of the trial court to the effect that the gifts were made in consideration of services rendered, gratitude, and affection, and that they were made voluntarily and without any undue influence or fraud on the part of the donee, and at a time when the testator fully understood what he was doing. *Norton v. Clark,* 4

[2. Whether in such case, there being an executor appointed and acting in Illinois, the testator's daughter could, without any right of action having been transferred to her in the course of administration, maintain an action, on the ground of fraud, undue influence, and mental incapacity of the testator, to recover for the estate the moneys so given by the testator in his lifetime and to establish a lien therefor on real estate in Wisconsin alleged to have been purchased by the donee with such moneys, is not determined.] *Ibid.*

GOOD FAITH. See ACTION, 1. CORPORATIONS, 4. MUNICIPAL CORPORATIONS, 21.

GROSS NEGLIGENCE. See AUTOMOBILES, 1, 3, 5, 6.

GUARANTY. See FRAUDS, STATUTE OF.

GUARDING MACHINERY. See APPEAL, 29. INSTRUCTIONS TO JURY, 11. MASTER AND SERVANT, 15.

HIGHWAYS.

Injuries from defects or obstructions. See BRIDGES. INSTRUCTIONS TO JURY, 7. MUNICIPAL CORPORATIONS, 18–29. TRIAL, 2.

1. Where a stump was situated within a few inches of the traveled track of a highway, with a root projecting into that track, at a point where the highway curved and began to descend, the jury was warranted in finding that it constituted a defect in the highway; and where the stump had occupied that position from

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time immemorial the jury was justified in finding that the town authorities in the exercise of ordinary care ought to have known of the defect and remedied it. *Johnson v. Iron River*, 139

2. Where an injury to a person traveling on a highway in a light vehicle was caused by the sudden slipping or stumbling of one of the horses and the consequent swinging of a wheel against a stump, there being no proof of excessive speed or of any great or long-continued inattention to his team upon the part of the driver, the question as to negligence of the driver was one for the jury, although he was not at the time intently watching the team. *Ibid.*

HOMESTEAD. See MORTGAGES, 4.

HOMICIDE.

See CRIMINAL LAW, 2, 6, 9, 11. INSTRUCTIONS TO JURY, 8.

The evidence in this case is *held* ample to sustain the verdict to the effect that the shot which killed the deputy sheriff was fired by the defendant. *Dietz v. State*, 462

HUSBAND AND WIFE.

See ABATEMENT AND REVIVAL, 5. APPEAL, 33. PATENTS.

For necessaries furnished his wife a husband is liable only under special circumstances and conditions, and these must be pleaded in order to state a cause of action against him. *Eder v. Grifka*, 606

ICE. See TAXATION, 1–4.

ICY SIDEWALKS. See MUNICIPAL CORPORATIONS, 26–29. TRIAL, 2.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 4–17.

INCOME. See WILLS, 10–12.

INCOMPETENT PERSONS. See COMPROMISE AND SETTLEMENT, 2.

INFANTS. See PARENT AND CHILD. PRINCIPAL AND AGENT.

INJUNCTION.

Grounds. See INSURANCE, 20. PATENTS, 1, 6. TAXATION, 5, 12.

Temporary or preliminary injunction.

1. The preliminary injunctional order issued in an action to restrain state officials from executing a statute containing penal provisions, on the ground that such statute is unconstitutional, does not exempt the plaintiff from the operation of the law or suspend it as to him, and is no defense to a criminal prosecution of such plaintiff, commenced after a final decision upholding the statute and dissolving the injunctional order, for violations of the law during the time the injunction was in force. *State v. Wadhams Oil Co.* 58

2. The action in such a case to restrain interference with rights and property under an invalid act and hence without authority of law, is an ordinary suit in equity, not prerogative in its character. That a circuit court commissioner had jurisdiction to issue the injunctional order therein is assumed, but not decided. *Ibid.*

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Same: Modifying and vacating.

3. A motion to vacate a temporary injunction challenges the sufficiency of the complaint and presents all questions which would be presented by a general demurrer. *Shepard v. Pabst,* 35

4. It cannot be held, on a mere motion to dissolve a temporary injunction, that a delay of six months after discovery of fraud in a sale of land is sufficient, as a matter of law, to bar an action based on such fraud. *Ibid.*

5. Where the purchaser of land seeks, in an action at law based on fraud, to recover damages equal in amount to the money paid and the unpaid notes given by him, if there is no averment that defendant is insolvent or unable to respond in damages, plaintiff is not entitled, under sec. 2774, Stats. (1898), to a temporary injunction restraining defendant from selling or transferring such notes or assigning the land contract, or from commencing actions thereon himself, either at law or in equity; and especially should such an injunction be dissolved where the defendant has been permitted to set up in the action a counterclaim upon the unpaid notes. *Ibid.*

INSTRUCTIONS TO JURY.

General rules. See APPEAL, 27. AUTOMOBILES, 4. CRIMINAL LAW, 16.

1. To charge the jury that plaintiff can recover in the action if the evidence shows something which confessedly the evidence does not show, is not an error prejudicial to the defendant. *Johnson v. Iron River,* 139

Requests for instructions. See INSTRUCTIONS TO JURY, 3, 7–9. RAILROADS, 5.

Amotion of officers. See CORPORATIONS, 4.

Automobiles. See AUTOMOBILES, 2, 4, 5.

Co-conspirators.

2. Erroneous general instructions as to the admissibility of statements and acts of co-conspirators and the evidence of an accomplice, referring evidently to confessions of a codefendant who did not testify, were rendered harmless by an explicit instruction that such confessions were binding only on the defendant making them unless, beyond a reasonable doubt, they were acquiesced in and assented to by the other. *Novkovic v. State,* 665

Contributory negligence.

3. In an action to recover for a personal injury causing death it was not error to refuse a requested instruction as to contributory negligence which, though perhaps not absolutely erroneous, was unnecessarily long, involved, and lacking in clarity. *West v. Bayfield Mill Co.* 145

4. Where an instruction given in connection with a question of the special verdict relating to contributory negligence submits as an element thereof the inquiry whether plaintiff knew and appreciated the danger, the question of assumption of the risk must be held to have been resolved by the jury in accordance with their answer to the question concerning contributory negligence, and the refusal to submit a separate question as to assumption of risk was not a prejudicial error. *Yanike v. Chicago & N. W. R. Co.* 554

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Criminal actions.

5. The trial court is not required in a criminal case, even upon request, to take up the different items of evidence relied on to establish the defendant's guilt and instruct the jury as to each that it is insufficient in itself to prove guilt. *Novkovic v. State,* 665

Damages.

6. An instruction upon the question of damages which stated that plaintiff was "entirely disabled" from doing her work as a boarding-house keeper, did not imply that she was so disabled continuously down to the time of the trial; but even if it did, the undisputed evidence in this case would warrant it, and hence no prejudice could have resulted. *Cohodes v. Menominee & Marinette L. & T. Co.* 308

Highways.

7. An error in charging the jury that it was the duty of the town to keep the highways in a *safe* condition, instead of in a reasonably safe condition, for travel, did not in this case affect any substantial right of the defendant, there being ample evidence to show a defect of long standing. *Johnson v. Iron River,* 139

Homicide.

8. Upon the trial of a wife and her alleged paramour for the murder of her husband, a requested instruction to the effect that the jury must find the wife not guilty unless "she was an active participant in the design and doing her part at the time in its furtherance," was misleading, in that the jury might infer therefrom that the wife could not be convicted unless she assisted the other defendant in delivering the blows which resulted in her husband's death, and was therefore properly refused, the court correctly charging that it was sufficient if a conspiracy in fact existed and the wife conspired, confederated, and agreed with her codefendant to commit the murder. *Novkovic v. State,* 665

Master and servant.

9. It is not always an absolute duty of an employee, upon discovering that machinery at which he is at work is out of repair, to inform his master of that fact; and a requested instruction laying down an unbending rule of that nature was properly refused. *West v. Bayfield Mill Co.* 145

10. Whether or not such a duty rests upon the employee may depend on numerous circumstances, such as the character of the defect, whether it be serious or trifling, the apparent imminence of danger therefrom, and the duties of the employee in other directions. *Ibid.*

11. An instruction to the effect that an employer was required to guard a dangerous gearing "in such a manner" as is usually done by employers of ordinary caution in the same line of business and under the same circumstances, is construed as relating to the effectiveness of the guard and not to the particular method employed, especially as that idea was clearly expressed in another part of the charge; and thus understood the instruction was not misleading. *Ibid.*

Mutual benefit societies: Amotion of officers. See CORPORATIONS, 4.

Proximate cause. See TRIAL, 16.

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INSURANCE.

FIRE.

Mutual companies: Assessments: Forfeiture.

1. A statute regulating assessments by mutual fire insurance companies, in force at the date of a policy, becomes a part thereof even though when the company was organized the statute was different and the then existing statute was embodied in the articles of organization and is indorsed upon the policy; and wherever the law and the language of the policy differ the law is paramount. *Breakstone v. Appleton Mut. F. Ins. Co.* 303
2. In sec. 1941—9, Stats. (Laws of 1909, ch. 459), the provision that a mutual fire insurance company, upon completing an assessment, shall cause to be published a notice stating the time when such assessment was levied and the time when the same becomes due, and that "such notice, together with proof of the publication thereof, shall be conclusive evidence of notice of such assessment," deals with the subject of proof, not with the assessment itself; and the particular method of proof therein referred to was not intended to be exclusive. *Ibid.*
3. If an assessment has been duly made and the notice thereof prescribed in said sec. 1941—9 has been duly given to a policy-holder by mail, a default in payment will be followed by suspension of his policy as provided in said section, regardless of the requirement for publication of notice. *Ibid.*
4. The notice of assessment given to a policy-holder by mail under said sec. 1941—9 is insufficient unless, in compliance with that section, it states among other things the amount of the assessment; and nonpayment by a policy-holder receiving only such an insufficient notice does not work a suspension or forfeiture. *Ibid.*

Defrauding insurer. See ARSON.

Loss: Mistake in describing property: Estoppel.

5. Although, as a result of a mutual mistake, a fire insurance policy does not correctly describe the land upon which insured buildings were located, such misdescription does not render the policy a nullity or prevent a recovery in case of loss, where the buildings destroyed were those intended by both parties to be insured, and the actual place where they were located and their environment were fully known to both. *Coats v. Camden Fire Ins. Asso.* 129
6. Where such mistake is disclosed upon the trial of an action at law upon the policy, it may be corrected in such action without resorting to an independent action in equity to reform the policy. *Ibid.*
7. The exclusion of evidence on the part of defendant in such a case to show an alleged misdescription of the premises is, therefore, not ground for reversal on appeal. *Ibid.*
8. Where the application for insurance states that the assured holds the buildings insured under a contract for a deed, the company is estopped, in an action on the policy, from asserting its invalidity on the ground that the insured had not a fee title or the sole and unconditional ownership, as stipulated therein. *Ibid.*

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9. Failure of an insurance company to attach to its policy a copy of the written application, as required by sec. 1945a, Stats. (1898), estops it from defeating, on the ground that the title was misrepresented in such application, the right of the insured to indemnity under the policy for loss sustained to his insurable interest in the property. *Ibid.*

LIFE.

Avoidance of policy: Fraud and misrepresentation.

10. An insurance company is not bound by a policy procured by means of false statements by the insured in his application, even though such statements were made at the solicitation of the company's agent and pursuant to a conspiracy to defraud entered into by the agent, the insured, and the beneficiary. *Wilhelm v. Columbian Knights,* 585

11. The legislature may change rules of evidence even though such change affects pending actions. *Ibid.*

[12. Whether the law relating to testimony of physicians could be changed so as to deprive a life insurance company of a valid defense secured by a statement in an application for a policy that the applicant waived "any and all provisions of law now existing or that may hereafter exist, preventing any physician from disclosing any information acquired in attending me in a professional capacity, or otherwise, or rendering him incompetent as a witness in any way whatever,"—not determined.] *Ibid.*

[13. Whether sec. 4075, Stats., as amended by ch. 322, Laws of 1911, would prevent an attending physician from testifying in such case, not determined.] *Ibid.*

14. Aside from the testimony of physicians in a case where the insured had stated and warranted in his application that he had not consulted a physician within five years and had never been under the care of a physician, the testimony of the beneficiary, the widow of the insured, showing that he consulted a physician and submitted to a surgical operation a few months before making the application, was sufficient to show a misrepresentation as to a material fact, invalidating the policy. *Ibid.*

Benefit societies: Reduction of benefits: Increase of rates: Conflict between policy and by-laws.

15. Where a member of a mutual benefit society consented to a ten per cent. reduction in the amount of his benefit certificate, to be paid into a guarantee fund in accordance with a by-law adopted by the society, his beneficiaries cannot after his death complain of such reduction as unreasonable and void. *Jaeger v. Grand Lodge, Hermann's Sons,* 354

16. Where there is a conflict between a policy of insurance or benefit certificate and the laws of the order issuing the same the former controls. *Ibid.*

17. An agreement by the insured, contained in his benefit certificate, that he will comply with the laws of the society then existing or which may thereafter be enacted, does not authorize the society to pass a retroactive by-law increasing for the entire period of his membership the amount of the monthly dues, which he has already paid according to the contract, and giving him the option to pay the aggregate amount of such increase in cash or

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suffer a reduction of the benefit by that amount. Such a by-law violates the contract of insurance and is unreasonable and void. *Ibid.*

[18. Whether a by-law discriminating between old and new members as to rates to be paid in the future is valid, not determined.] *Ibid.*

Same: Assessments: Wrongful diversion of funds.

19. The "constitution and by-laws" of a mutual benefit society provided that all moneys received from assessments, except three per cent. thereof, should be placed to the credit of a fund established for the payment of benefit certificates and known as the assessment fund, and that the laws in regard to such fund should not be amended except in the manner therein provided. Provision was also made for the collection of additional revenues, to be placed in a general fund, to defray necessary expenses for management, benefits, or agitation. *Held*, that the provision in respect to the assessment fund was contractual and could be modified only by amendment in the manner prescribed, or by mutual consent. *Wolf v. G. U. G. Germania*, 576

20. The society engaged an organizer, under a contract by which he was to receive as part of his commission seventy-five per cent. of the first twelve assessments of each new member he obtained, and at several successive meetings of the general council a resolution was adopted providing that said seventy-five per cent. of the first twelve assessments should be carried into and credited to an agitation fund; but no amendment of the constitution and by-laws was otherwise attempted. This diversion of moneys from the assessment fund was acquiesced in for several years, but suit for an injunction was finally brought by members of the society. *Held*, that relief against future diversion of the fund was properly granted. *Ibid.*

INTEREST. See DEEDS, 7. EXECUTORS AND ADMINISTRATORS, 4.

INTERLOCUTORY JUDGMENT. See DIVORCE, 3.

INTERSTATE COMMERCE. See STATUTES, 2. TOWNS, 2, 3.

JAIL LIMITS. See SHERIFFS, 17, 18.

JOINDER OF CAUSES OF ACTION. See ACTION, 2.

JUDGES.

Salaries.

1. The $400 allowed to each circuit judge by ch. 263, Laws of 1889, for "his necessary expenses while in the discharge of his duties" was not a part of the "compensation" of such judge within the meaning of sec. 26, art. IV, Const.; and the "excess over the compensation of other circuit judges," which by ch. 377, Laws of 1897, was to be paid to the judges of the Second judicial circuit by the county of Milwaukee, was the difference ($1,400) between the salary of other circuit judges and the salary fixed for the judges in said Second circuit. *Milwaukee County v. Halsey*, 82

2. Ch. 138 and ch. 414, Laws of 1901, fixing the salaries of circuit judges at $4,000, with an additional allowance for expenses, and repealing all acts and parts of acts in conflict therewith, did not affect the salaries of the judges in the Second circuit as fixed by ch. 377, Laws of 1897, but only the salaries of such

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judges as were before fixed by ch. 12, Stats. (1898), which the said acts purported to amend; and the excess to be paid to judges of the Second circuit by Milwaukee county was thereby reduced to $1,000. *Ibid.*

3. A law relating to the salaries of one class of circuit judges does not in any way conflict with a law fixing the salaries of another and different class. *Ibid.*

4. Ch. 520, Laws of 1905, which provides that "the judges of the circuit courts shall receive as salary, in addition to the amount now received, the sum of $600 per annum," was an independent enactment and applied to all circuit judges including those in the Second circuit. *Ibid.*

5. A statute relating to the creation, tenure, and salary of a state officer, such as a circuit judge, or creating, or regulating the administration of public justice by, a court of general common-law and equity jurisdiction within a judicial circuit, is neither special, private, nor local in the constitutional sense. *Ibid.*

6. The mere fact that in a judicial circuit consisting of a single county a statute creates a charge upon such county for part of the salary of the circuit judge or judges, does not make the law a part of the system of county government so as to render the constitutional rule of uniformity applicable; and the fact that the county is mentioned by name in the act is unimportant. *Ibid.*

7. Such an act does not contravene the constitutional requirement that the rule of taxation shall be uniform. *Ibid.*

8. Counties having a population of 100,000 or more, each constituting a single judicial circuit, have the characteristics of a class in numbers, in wealth, in amount of litigation therein, in the extra expense which they cause to the state, and in the advantages they receive from having the circuit court of several judges constantly within their boundaries, which furnish a sufficient reason for imposing upon such class a share of the expense of administering justice, from which other counties are exempt. *Ibid.*

JUDGMENT.
Interlocutory judgment. See DIVORCE.
On trial of issues: Dismissal on merits. See WATERS AND WATERCOURSES, 4.
Same: Conformity to findings. See MORTGAGES, 4.
Conclusiveness of adjudication. See DIVORCE, 2.

JUDICIAL NOTICE. See STATUTES, 1.

JUDICIAL POWERS. See CONSTITUTIONAL LAW, 2.

JURISDICTION. See APPEAL, 1, 2. EQUITY, 1. INJUNCTION, 2. STATES, 1.

JURY.

Control by court: Urging agreement: Comforts to be provided.

1. The trial judge may properly admonish a jury of the importance, from a public as well as a private standpoint, of using their very best endeavors to agree upon a verdict, making it clear that no effort is being made to coerce any one to surrender his deliberate, honest judgment. *Barlow v. Foster,* 613

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2. Although, after having deliberated some twenty-nine hours, the jury reported that in their opinion an agreement was impossible, and although no conveniences were provided for their rest at night, there was no error in this case in keeping them out more than forty hours. *Ibid.*

JUSTICES' COURTS.

Appeals.

1. An appeal from justice's court is not taken until both a notice of appeal and an affidavit of good faith are presented to the justice as required by sec. 3754, Stats. (1898). *Mueller v. Rice,* 548

2. Where the defendant in an action of unlawful detainer gave notice of appeal from a judgment of restitution and an undertaking to stay execution under sec. 3368, Stats. (1898), conditioned to pay the *costs of the appeal* and the rent and other damages accruing *during the appeal,* but did not perfect the appeal by filing any affidavit of good faith, such conditions of the undertaking never became operative and hence could not be breached. *Ibid.*

3. Although such undertaking recited that an appeal had been taken, and upon the filing thereof a writ of assistance, which had been issued, was returned unexecuted and defendant remained in possession of the premises for two weeks or more before she was put out on a second writ, those who executed the undertaking were not estopped from claiming that no appeal had in fact been taken. *Ibid.*

LACHES. See EQUITY, 2.

LAKES. See WATERS AND WATERCOURSES, 6.

LANDLORD AND TENANT.

Leases: Description of property: Ambiguity.

Plaintiff's father, by a lease drawn for him by the plaintiff, leased to defendant a "dwelling house, known as No. 185 Farwell avenue, . . . and the premises thereof and appurtenances pertaining thereto, being located on the north thirty feet of the aforesaid premises." Some years before, the father, then owning sixty feet frontage on said avenue, on the north thirty feet of which stood the dwelling house in question, had conveyed the south thirty feet to the plaintiff, but the deed was not recorded until after the giving of the lease in question. Upon evidence showing the above and other facts it is *held* that the lease was intended by the parties thereto to cover only the north thirty feet, and that plaintiff was not estopped to assert title to his own land as against defendant, and, being in constructive possession thereof, to maintain an action for trespass. *Carroll v. Manierre,* 409

LAW OF THE CASE. See APPEAL, 29.

LEASES. See LANDLORD AND TENANT.

LEGACIES. See EXECUTORS AND ADMINISTRATORS, 1–4. WILLS.

LEGISLATIVE POWERS. See CONSTITUTIONAL LAW. INSURANCE, 11. JUDGES. PUBLIC UTILITIES, 4. TAXATION, 9.

LIBEL AND SLANDER. See EVIDENCE, 4–7.

LIENS. See DEEDS, 7, 8. PLEDGES, 2.

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LIMITATION OF ACTIONS.

See EXECUTORS AND ADMINISTRATORS, 2, 5.

In this state it is held that a statute of limitations, when it has fully run, takes away the right as well as the remedy. [Whether or not there is any presumption that the law of a foreign country not subject to the constitutional limitations which form the basis of such holding, or of a country operating under the civil law, is the same as our own, not determined.] *Hite v. Keene,* 207

LOCAL STATUTE. See JUDGES, 5.

LOGS AND LOGGING.

See MASTER AND SERVANT, 3.

A logging contract provided that during a certain season plaintiff should cut, haul, and load on cars all the timber on certain lands; that defendant should furnish a continual service of fifteen cars each day as might be required by plaintiff, and in case of failure to deliver said cars plaintiff should deck all logs not loaded on cars at track; that when said logs were so decked plaintiff should be deemed to have fulfilled his contract the same as though they were loaded on cars; and that if it should be necessary, on account of defendant's failure to provide cars as aforesaid and the accumulation of a surplus of logs which must be decked, defendant should have the option either itself to load the logs so decked or to allow plaintiff to load them at the price of ninety cents per thousand feet. *Held,* (1) that defendant was under no obligation to furnish more than fifteen cars per day, even though that number was insufficient to take care of the logs as fast as plaintiff found it necessary to haul them in order to complete the contract during the season; and (2) that the obligation to pay plaintiff ninety cents per thousand feet for loading decked logs was confined to logs decked by reason of defendant's failure to furnish the specified service of fifteen cars per day, and therefore, that number of cars having been in fact furnished, plaintiff was not entitled to recover anything under the last mentioned provision of the contract for the extra work in loading logs which it had become necessary to deck by reason of the insufficiency of such stipulated service. *Hammond v. John H. Kaiser Lumber Co.* 189

MACHINERY. See INSTRUCTIONS TO JURY, 9–11. MASTER AND SERVANT, 6–10, 13, 15.

MANDAMUS. See APPEAL, 7.

MANDATORY STATUTES. See NEW TRIAL, 5.

MASTER AND SERVANT.

When the relation exists. See MASTER AND SERVANT, 16.

1. If a servant voluntarily and unnecessarily leaves his employment and assumes a position of peril merely for his own pleasure or convenience he ceases to be an employee for the time being and becomes either a trespasser or at best a mere licensee. *Charron v. Northwestern Fuel Co.* 240

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2. But a workman employed in hard physical labor who, while stopping for a moment's respite of the ordinary and usual nature, steps a few feet from his line of travel, is not thereby divested of his character as an employee. *Ibid.*

Master's liability for injuries to servant: General rules. See COMPROMISE AND SETTLEMENT, 2. RAILROADS, 2–7. STATUTES, 2.

Same: Pleading.

3. In an action for personal injuries to a servant, the complaint, liberally construed, is *held* sufficiently to show that skids upon which plaintiff was piling logs for defendant were insufficient and defective; that defendant failed in its duty to furnish reasonably safe skids suitable for the purpose for which they were to be used; and that plaintiff was not necessarily chargeable with knowledge of their defective and dangerous condition. *Platteter v. Paulson-Ellingson Lumber Co.* 186

Same: Duty of master.

4. Where a railway company places a freight car, with brakes set, on a sidetrack to serve the business of a proprietor whose employees are expected, according to custom, to move the car to the particular point for loading, such proprietor has a right to presume that it is in suitable condition for use, unless the contrary appears without particular or technical inspection, in the absence of obvious defects or knowledge of some fact or circumstance, actually or constructively brought home to such proprietor, which would ordinarily put an ordinarily careful person on such inquiry as to lead to knowledge of a contrary condition existing. So *held* in an action against the proprietor by an employee alleged to have been injured by reason of defects in the brake of such car. *Gager v. Stolle-Barndt L. Co.* 154

5. The proprietor in such case is bound to observe defects which would naturally and ordinarily attract the attention of a person so circumstanced, having no duty to look particularly or search for such difficulties. *Ibid.*

Same: Machinery. See INSTRUCTIONS TO JURY, 9–11. MASTER AND SERVANT, 13, 15.

6. In an action by an employee in an establishment for manufacturing structural steel work, for injuries received while helping to move a heavy viaduct arch by reason of the slipping of the chain by which the arch was being lifted, a finding by the jury that the employer negligently allowed an unsafe and improper method of shortening the lifting chain to be used in its shop is *held* to be sustained by the evidence. *Flynn v. Modern Steel Structural Co.* 457

7. If in such a case the employer had knowingly permitted the customary use in the shop of a method of shortening the chain which it knew or ought to have known to be unsafe, it was guilty of negligence, even though it had promulgated formal orders to adopt some other method. *Ibid.*

8. The question whether plaintiff was struck and injured by the governor belt of an engine, *held* one for the jury. *Yanike v. Chicago & N. W. R. Co.* 554

9. To render a person liable for the consequences of a negligent act it is not necessary that such consequences should have been

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specifically contemplated by him; it is sufficient that they are within the field of reasonable anticipation. *Ibid.*

10. The question whether or not an injury was reasonably to be anticipated from the defective condition of the belt was for the jury; as were also the questions of plaintiff's assumption of the risk and contributory negligence. *Ibid.*

Same: Places to work. See MASTER AND SERVANT, 14.

11. The work of unloading freight from a vessel being accompanied by risks and hazards springing from the constantly changing and shifting conditions which arise as the work proceeds, and it being impossible for the employer to keep the changing working place of the employees engaged in such work free from the hazards and dangers incident thereto and created by themselves, such employees are presumed to know and assume them as risks of the employment. *Brown v. Conners,* 403

12. So *held,* where an employee was injured by the fall of a pile of sheet steel which he with others was engaged in unloading from the deck of a vessel, the situation and arrangement of the pile, its relation to the working place, and the danger of its falling over being obvious and as readily comprehended by the employee as by the foreman in charge of the work. *Ibid.*

Same: Rules and regulations. See MASTER AND SERVANT, 7.

Same: Warning servant.

13. Plaintiff, a member of a gang of carpenters who were repairing defendant's coal dock, was required, in the performance of his duties, to cross a platform underneath a rig upon which a suspended clam-shell bucket was operated. His line of travel crossed the path of the bucket at right angles. In one of his trips across this platform he stopped a minute or two to rest and had stepped to the edge of the platform, about eight feet from his line of travel, and was looking down upon a vessel at the dock, when the bucket, which had been started without warning, swept him off the platform, injuring him severely. *Held,* that the jury were justified in finding that defendant's failure to give warning before starting the bucket constituted a want of ordinary care, and that plaintiff was not guilty of contributory negligence in stopping upon the platform as he did. *Charron v. Northwestern Fuel Co.* 240

Same: Fellow-servant.

14. Members of a carpenter's repair gang engaged in making repairs and changes on the premises of the master, in the discharge of the latter's duty to provide a safe place to work, are not fellow-servants with ordinary employees who are simply employed to carry on the employer's business. *Charron v. Northwestern Fuel Co.* 240

Same: Risks assumed by servant. See INSTRUCTIONS TO JURY, 4. MASTER AND SERVANT, 10, 11. RAILROADS, 3.

Same: Contributory negligence. See MASTER AND SERVANT, 10, 13, 15. RAILROADS, 3.

15. Failure of an employee in a sawmill either to notify his superior that a board guarding a gearing was off or to repair it himself with the tools at hand, during an interval of ten minutes when the mill was not running, cannot be said as a matter of law to have been contributory negligence, it appearing that he had nu-

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merous duties to perform during such interval. *West v. Bayfield Mill Co.* 145

Liability for injuries to third persons: Acts and omissions of servant.

16. A chauffeur employed at a public garage and sent out in charge of a hired car to operate and manage it is, while so engaged, the servant of the keeper of the garage and not of the hirer of the car. *Gerretson v. Rambler Garage Co.* 528

17. If such chauffeur, while acting within the scope of his duty, is guilty of a want of ordinary care in driving the car which results in injury to the occupants, the master is liable. *Ibid.*

18. In such case the cause of action is based upon the tort or negligence and not upon the contract of hiring, and it is therefore immaterial whether or not the contract was void because made and performed on Sunday. *Ibid.*

MAXIMS.
Expressio unius exclusio alterius, 489.
He who comes into equity must come with clean hands, 255, 256.
Nemo ex suo delicto meliorem suam conditionem facere potest, 256.
Noscitur a sociis, 514.

MEASURE OF DAMAGES. See ABATEMENT AND REVIVAL, 4, 5. DAMAGES, 2–7. EXECUTORS AND ADMINISTRATORS, 3. MUNICIPAL CORPORATIONS, 16.

MENTAL ANGUISH. See TELEGRAPHS AND TELEPHONES, 1, 4.

MILWAUKEE CITY CHARTER. See MUNICIPAL CORPORATIONS, 4–6, 11.

MINORS. See PARENT AND CHILD. PRINCIPAL AND AGENT.

MISSISSIPPI RIVER. See STATES, 3.

MISTAKE. See APPEAL, 8–10. INSURANCE, 5, 6. LANDLORD AND TENANT.

MORTGAGES.

Requisites and validity. See DEEDS, 6–9. PARTNERSHIP, 4, 5.

Extension of time of payment: Oral agreement: Rights of assignee.

1. An agreement by which, for a valuable consideration paid by the mortgagor, the time for payment of a note and mortgage is extended, is valid though not in writing. *Phillips v. Holland,* 524

2. Such agreement is binding upon one to whom the note and mortgage were assigned after the due date of the note but before the extended time had expired, although such assignee was assured by the assignor that the note was then past due. *Ibid.*

Foreclosure: Agreement to notify: Findings: Judgment. See PLEADING, 2.

3. An agreement not to bring a foreclosure action without giving prior notice to the mortgagor is void where no time of forbearance is agreed upon and there is no consideration. *Radford v. Smith,* 163

4. In a foreclosure action the court found that the mortgaged premises were homestead and could not be sold in parcels without injury to the interests of the parties. The judgment provided that the premises "or so much of them as may be sufficient to raise the amount due . . . and which may be sold separately

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without material injury to the parties interested, be sold," etc. *Held*, that there was no prejudicial variance from the finding. *Ibid.*

5. In a foreclosure action, inclusion in the judgment of the amount paid by plaintiff for delinquent taxes cannot be held error in the absence of any bill of exceptions. *Ibid.*

6. No power of sale is imported into the statutory form of mortgage by sec. 2209, Stats. (1898), and that statute authorizes the foreclosure of such mortgages only in the manner that other mortgages which do not contain a power of sale are foreclosed. *Dawson v. Bauch*, 144

7. A statutory form of mortgage cannot be foreclosed by advertisement, such foreclosure being restricted by sec. 3523, Stats. (1898), to mortgages containing a power of sale. *Ibid.*

MUNICIPAL CORPORATIONS.

Incorporation: Charter. See CONSTITUTIONAL LAW, 4–11.

Ordinances. See MUNICIPAL CORPORATIONS, 10–13, 28. TELEGRAPHS AND TELEPHONES, 5–7.

1. In a municipal ordinance prohibiting any person from leasing or letting, "as landlord," any house, room, or other premises in the city to be used for the purpose of prostitution, the word "landlord" includes a person who lets a room for said purpose in a building occupied by him, although he himself occupies such building only as a tenant under an oral lease from month to month. *Milwaukee v. Beatty*, 349

2. Where a municipal ordinance provides that any person violating it shall upon conviction "be fined," but does not make the prohibited acts punishable "by fine and imprisonment," or "by fine or imprisonment," nor specially declare them to be misdemeanors, a civil action may be maintained by the city under sec. 3294, Stats. (1898), to recover the money penalty provided. *Ibid.*

3. Within the meaning of ch. 218, Laws of 1899, as amended by ch. 72, Laws of 1907,—providing that every person "convicted" before the district court of Milwaukee county "may appeal from the sentence or judgment against him to the municipal court,"—the word "convicted" applies to a person against whom a judgment has been recovered in a civil action for the money penalty for violation of a city ordinance. *Ibid.*

Contracts. See PUBLIC UTILITIES.

Public improvements: Streets: Change of grade: Damages. See APPEAL, 2.

4. Sec. 8 of ch. VII of the Milwaukee city charter does not limit the right of the lotowner, in the case of a change of a street grade, to damages only for the purpose of reducing benefits or as an offset against benefits. *Schmidt v. Milwaukee*, 367

5. Lots fronting on the improvement, with respect to which an assessment of benefits and damages is provided for in secs. 7, 8, ch. VII, Milwaukee city charter, are not limited to lots designated on the plat which actually abut upon the street in question; but such a "lot" may consist of parcels forming a distinct

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homestead or other inclosure, a messuage or unit of property which fronts on the improvement, but which is laid out, occupied, or inclosed without reference to platted lines. *Ibid.*

6. But where two parcels are separated by a public street or alley, no matter how they are occupied or used, they cannot under the provisions of the Milwaukee city charter be considered as a unit for the purpose of assessment. *Ibid.*

7. Under such city charter the board of public works determines in the first instance what constitutes a lot fronting on the improvement in the particular case; but on appeal the circuit court considers and determines the matter *de novo*. *Ibid.*

8. Where the board of public works assessed damages to nine lots in a body owned by plaintiff, and on appeal the jury found no damages to the property as a whole but awarded damages as to the one lot which abutted on the street affected by the improvement, that constituted a determination by the jury of what part of the plaintiff's property constituted a "lot" fronting on the improvement and affected or injured thereby. *Ibid.*

9. Where plaintiff's property fronted upon two cross streets the grades of which were changed, but was divided into separate parcels by a public alley, and he took a separate appeal from the award of damages as to each street, which appeals were consolidated for the purpose of trial, it was proper upon such trial to keep separate and submit separately to the jury the questions as to the damages resulting from the change of the grade of each of said streets. *Ibid.*

10. Where the streets involved were crossed by railroad tracks and the changes in grade were made in connection with the depression of such tracks pursuant to an ordinance passed by the common council under its police power, and consisted in a slight elevation of each of the bridges or viaducts over such railroad tracks, the drying up of a spring and the loss of a sidetrack, which were attributable to the depression of the railroad tracks, were properly excluded from the award of damages against the city arising from such changes of grade. *Ibid.*

11. Ch. 376, Laws of 1901, authorizing cities of the first class to construct viaducts over railroad tracks and to negotiate with the railroad companies for the payment of a proportion of the expense of such construction, is a grant of additional power, not a limitation upon the police power given by the Milwaukee city charter (ch. IV, sec. 3, subd. 48) to control the location of railroad tracks and to require railroad companies to construct and maintain at their own expense such bridges, viaducts, etc., as the common council may deem necessary. *Ibid.*

12. The provisions of said ch. 376, Laws of 1901, relative to the assessment of damages sustained by the owners of abutting property, are applicable only when the city has determined itself to construct a viaduct, and not in a case where, under the police power, the council has ordered a railroad company to depress its tracks and construct a viaduct or overhead crossing at its own expense. *Ibid.*

13. Where the council by ordinance required a railroad company to depress its tracks and to construct bridges or viaducts at street crossings, and so fixed the depth of the depression that the viaducts must be elevated above the former street grades, thus

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making necessary the raising of the grades of the streets for approaches to such viaducts, a subsequent ordinance providing for such raising of the grades was an independent and separate exercise of power on the part of the city, and in the assessment of damages by reason of such change of grade no damages growing out of the acts of the railroad company in attempting to comply with the earlier ordinance are within the jurisdiction of the board of public works or of the circuit court on appeal from such board. *Ibid.*

[14. Whether in such a case the landowner has a right of action against the railroad company on account of damages resulting from the depression of the tracks, or whether all sucn damages were compensated in the original purchase or condemnation of the land by the railroad company, is not determined.] *Ibid.*

15. Where the grade of a street is raised, the right of the owner of abutting lands to damages is the same whether the change in grade is made by earth filling or by the extension of a viaduct in front of such lots. *Ibid.*

16. The damages which the owner of abutting lots is entitled to recover for a change in the grade of the street are measured by the depreciation in value caused by the change. The cost of restoration, though a factor in estimating such damages, is not a proper item of damages to be found separately, since to allow the recovery of such cost would be to ignore the benefits which should be offset. *Ibid.*

17. In fixing the damages to abutting property from a change of street grade, the jury are not bound by the opinions or arguments of experts, particularly where their estimates are based upon unwarranted premises or upon reasons fanciful and ingenious rather than sound. *Ibid.*

Streets: Encroachments and obstructions: Trespass by city officials.

18. Secs. 1326 and 1330, Stats. (1898), relating to encroachments upon and obstructions of public highways, are applicable to cities. *Jennings v. Johonnott,* 660

19. Any object unlawfully placed within the limits of a highway is an obstruction if it impedes or seriously inconveniences public travel or renders it dangerous, even though it does not stop travel. *Ibid.*

20. A fence in front of a city lot, extending only one foot into the street, is a mere encroachment so long as the fence and walk outside are continuous with those in front of the adjoining lots, but may become dangerous and an obstruction if a jog in the walk and fence is created by the building of a new fence and walk on the true line in front of an adjoining lot. *Ibid.*

21. In an action against city officials for tearing down plaintiff's fence and constructing a sidewalk, where punitory damages were claimed, it was competent for defendants to assert that they acted in good faith in removing the fence (which intruded into the street) because it was necessary to build a new sidewalk and they wished to build it on the true line, upon which an adjoining walk had been built. *Ibid.*

22. If, in laying a new sidewalk in front of plaintiff's lot, city officials confined their operations to the street, they cannot be held guilty of a trespass, even though they ignored the provisions

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of the law to such an extent that plaintiff would not be chargeable with the cost of the new walk. *Ibid.*

Torts: Injuries from defective sidewalks, etc.

23. Service of notice of injury as provided in sec. 1339, Stats., is not a condition precedent to the maintenance of an action to recover damages for death of a person caused by insufficiency of a public highway. *Laconte v. Kenosha,* 343

24. Where a person whose death was caused in this state by a wrongful act, neglect, or default was a resident of the state, had taken out his first citizenship papers, but left a widow in a foreign country who, at the time of his death, purposed joining him here, such widow should not be deemed a nonresident alien, but is entitled to the rights secured to surviving relatives by secs. 4255, 4256, Stats., even though the death occurred prior to the amendment of said sec. 4256 by ch. 226, Laws of 1911. *Ibid.*

25. In an action against a city to recover damages for death of a person, alleged to have been caused by insufficiency of a sidewalk, an error in permitting a witness to testify to an admission by the mayor, after the accident, that he knew the sidewalk was dangerous, was so far cured by an explicit instruction to the jury to disregard such evidence as not to be ground for reversal of a judgment against the city. *Ibid.*

26. The duty of a city as to keeping its sidewalks reasonably safe for public travel does not, generally speaking, require it to obviate danger from mere slipperiness produced by natural causes. *Griswold v. Camp,* 399

27. At common law the owner or occupant of a lot owes no duty to protect travelers from danger of being injured by the slippery condition of the sidewalk. *Ibid.*

28. A city ordinance requiring, under penalty, the owners or occupants of lots to keep icy sidewalks in front thereof sprinkled with ashes, sawdust, or sand, was not intended to require such persons to aid the city in the performance of a duty resting upon it, and does not, in case of the failure of such an owner or occupant to comply therewith, render him liable, on the ground of negligence, to a person injured by reason of the slippery condition of the walk. *Smith v. Milwaukee B. & T. Exch.* 91 Wis. 360, distinguished. *Ibid.*

29. Whether failure to obey a statute designed to conserve human safety is negligence *per se* depends upon the presumed legislative intent. *Ibid.*

MURDER. See CRIMINAL LAW, 2, 6, 9, 11. HOMICIDE. INSTRUCTIONS TO JURY, 8.

NAMES. See PATENTS, 5, 6.

NAVIGABLE WATERS. See STATES. WATERS AND WATERCOURSES, 6.

NECESSARIES. See APPEAL, 33. HUSBAND AND WIFE.

NECESSARY PARTIES. See PATENTS, 1.

NEGLIGENCE.

Acts and omissions constituting negligence. See ABATEMENT AND REVIVAL. AUTOMOBILES. BRIDGES. COMPROMISE AND SETTLEMENT, 2. HIGHWAYS. MASTER AND SERVANT. MUNICIPAL COR-

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PORATIONS, 23–29. RAILROADS. RELEASE. STREET RAILWAYS, 1, 3. TELEGRAPHS AND TELEPHONES, 1, 3, 4. TRIAL, 1–3, 12–16. WITNESSES, 1, 2.

Same: Unlawful sale of toy pistol: Intervening acts.

1. One who does an unlawful act knowing, or with reasonable ground to believe, that it may probably result, in the natural course of events, in causing injury to some human being and regardless of whether it does or not, is liable in legal damages for the consequences, though directly brought about by the acts of other persons intervening, set in motion by the first unlawful act, and regardless of such interveners having acted with such knowledge as to be likewise liable. *Pizzo v. Wiemann*, 235

2. Under the above rule, wholesalers in this state who sold a toy pistol to retailers are liable in damages for the death of a boy caused by his using the pistol after buying it in this state from the retailers, the sale of such pistol being a criminal offense under sec. 4397*a*, Stats. (1898). *Ibid.*

Proximate cause. See AUTOMOBILES, 3. RAILROADS, 4, 6. TRIAL, 16.

Negligence per se. See MUNICIPAL CORPORATIONS, 29.

Gross negligence. See AUTOMOBILES, 1, 3, 5, 6.

Comparative negligence. See RAILROADS, 4–7.

Contributory negligence. See HIGHWAYS, 2. INSTRUCTIONS TO JURY, 3, 4. MASTER AND SERVANT, 10, 13, 15. RAILROADS, 3. STREET RAILWAYS, 3.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. BROKERS, 1. PLEDGES.

NEWLY DISCOVERED EVIDENCE. See NEW TRIAL, 3, 4.

NEW TRIAL.

Grounds: Verdict or findings contrary to law or evidence: Discretion. See STREET RAILWAYS, 1.

1. The constructive denial of a motion for a new trial, under sec. 2878, Stats. (Supp. 1906: Laws of 1901, ch. 100), will not be treated on appeal as an exercise of discretion where, as in this case, the trial court after the term, believing it had jurisdiction, by an order granting a new trial expressed the opinion that justice had not been done. *Kurath v. Gove A. Co.* 390

2. Under such circumstances, if the facts sustain the trial court's opinion that justice has not been done, the judgment should be reversed and the cause remanded for a new trial. *Ibid.*

Same: Newly discovered evidence.

3. To entitle a party to a new trial on the ground of newly discovered evidence, it must appear that he used due diligence to secure such evidence, that it is not merely cumulative, and that its production would probably bring about a different result; and upon this last point the trial court is best qualified to judge. *Cohodes v. Menominee & M. L. & T. Co.* 308

4. A motion for a new trial on the ground of newly discovered evidence was properly denied where, if there had been proper diligence, such evidence would have been discovered and produced at the trial. *Kiefer-Haessler Hardware Co. v. Paulus*, 453

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Proceedings to procure new trial.

5. A motion for a new trial, not "made in open court and entered in the clerk's minutes" as provided in Circuit Court Rule XXXIII, does not operate as a stay of proceedings; and it seems that it cannot so operate, even when made and entered as provided in that rule,—sec. 2861, Stats. (1898), being mandatory to the effect that the clerk, in case of a verdict, shall enter judgment, in the absence of some judicial direction to the contrary. *Colle v. Kewaunee, G. B. & W. R. Co.* 96

6. Although, strictly speaking, sec. 2861, Stats. (1898), does not apply where the verdict so finds the facts as to render an order for judgment necessary, yet the spirit of it is that there shall be no delay after verdict by reason of a motion for new trial, unless by order of court. *Ibid.*

7. A motion, made five months after notice of the entry of judgment, to vacate the verdict and judgment and grant a new trial or to extend the time for settling a bill of exceptions, was properly denied, no particular reason for vacating the judgment being assigned except that its entry was an irregularity because, it was claimed, a motion for a new trial had operated as a stay, and there being no satisfactory explanation of the delay and no showing of a good-faith purpose to appeal because of supposed prejudicial error. KERWIN and TIMLIN, JJ., are of the opinion that the good faith of counsel in such matters should be presumed. *Ibid.*

NONRESIDENT ALIEN. See MUNICIPAL CORPORATIONS, 24.

NOTICE.
Of appeal. See APPEAL, 30, 31. JUSTICES' COURTS, 1, 2.
Of assessment. See INSURANCE, 2–4.
Of defect. See HIGHWAYS, 1. PLEDGES, 6.
Of injury. See MUNICIPAL CORPORATIONS, 23.
By record. See CHATTEL MORTGAGES, 3. DEEDS, 6.

OBSTRUCTIONS. See MUNICIPAL CORPORATIONS, 18–22.

OFFICERS.

De facto and de jure officers. See CORPORATIONS, 1.

Salaries. See JUDGES.

Liabilities. See CORPORATIONS, 3, 4. COSTS, 3. SHERIFFS.

Same: Liability on official bonds.

1. An official bond entered into by the surety for a money consideration, conditioned that the officer shall faithfully perform the duties of his office and shall pay over or account for all moneys which may come into his hands by reason of his holding such office, is an indemnity bond partaking of the essential features of an insurance contract, and should be construed most strongly against the surety preparing and furnishing it. *Forest County v. United Surety Co.* 323

2. To constitute a breach of an official bond there must be a breach of official duty, the liability of the surety being limited to acts done by the principal by virtue of his office or by reason of the fact that he holds the office. *Ibid.*

[3. Whether a condition to account for all moneys that may come into the hands of the officer *by reason of his holding such of-*

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fice is broader than one to account for all moneys that may come into his hands *by virtue of his office*, not determined.] *Ibid.*

4. Where a county judge who, under sec. 2454, Stats. (Supp. 1906: Laws of 1903, ch. 45), was authorized to present bills and receive pay from the county for certain extra services, presented illegal bills for services for which he was not entitled to compensation, and received money thereon from the county, such moneys were received by virtue of his office; and there was a breach of his official duty and of his bond. *Ibid.*

5. An action upon the official bond of a county judge is properly brought, under sec. 984, Stats. (1898), in the name of the county. The provision in that section making it a duty of the chairman of the county board to see that the action is prosecuted, does not mean that it must be done in his name, since the statute specifically provides otherwise. *Ibid.*

Amotion. See CORPORATIONS, 3, 4.

OPINION EVIDENCE. See EVIDENCE, 4–7. MUNICIPAL CORPORATIONS, 17.

OPTIONS. See CONTRACTS, 1, 3–5.

ORAL CONTRACTS. See EXECUTORS AND ADMINISTRATORS, 1–4, 9. FRAUDS, STATUTE OF. MORTGAGES, 1, 2. PARTNERSHIP, 1.

ORDINANCES. See MUNICIPAL CORPORATIONS, 1–3, 10–13, 28. TELEGRAPHS AND TELEPHONES, 5–7.

PARENT AND CHILD.

See ABATEMENT AND REVIVAL, 5.

1. Evidence that a son who, after attaining majority, had worked for his father on the latter's farm at intervals for about fifteen years, said to his father that he had remained at home more than the other members of the family; that thereupon the father said he would give him $1,000 for the work he had done and $20 per month for future work; and that the son said "all right," and continued to work for the father until the death of the latter, is *held* to sustain a verdict to the effect that the agreement was that the son should remain and work for the father in consideration of the latter's promise to pay him for both past and future services. *Olson v. Olson*, 248

2. Such being the agreement, and the son having fully performed on his part, the entire contract as to payment for past services as well as for those to be rendered thereafter was based upon a valid consideration. *Ibid.*

PAROL EVIDENCE. See EVIDENCE, 3.

PARTIES. See PATENTS, 1.

PARTNERSHIP.

The relation: Executed oral agreement for dealings in lands.

1. Although an oral agreement to conduct partnership dealings in lands is void under the statute of frauds, yet where such contract has been fully executed by the parties, or fully executed as to certain separable and independent transactions, so that nothing remains to be done but to ascertain the money balance

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due from one partner to the other, it is, as to such completed transactions, not within the statute, and equity will entertain an action between the partners for an accounting. *Huntington v. Burdeau*, 263

2. In such an action the court cannot appoint a receiver in respect to alleged assets of the partnership remaining unconverted, since to do so would be to execute a void contract. *Ibid.*

Notice to partners of firm transactions.

3. Notice to one partner concerning partnership transactions is notice to the copartners. *Loosen v. Schissler*, 449

4. Thus, where a firm of loan brokers lent money for a client, taking a mortgage to him as security, each partner had at least constructive notice of such mortgage, and it is prior as a lien to a mortgage afterwards taken by one of the partners in his own name on the same land and recorded before the mortgage to the client. *Ibid.*

5. The fact that the client's mortgage was prior to that of the partner did not make such partner in any way a debtor of the client so that the client's mortgage would be transferred or in any way affected by an instrument of settlement by the terms of which the client sold and transferred to such partner and another member of the firm all debts due or to become due to him from the firm or either of said partners, together with all accounts, notes, actions, claims, demands, etc., whatsoever against said partners or either of them. *Ibid.*

PASSENGERS. See STREET RAILWAYS.

PATENTS.

Exclusive right to make patented article: Contracts: Improvements: Trade-names: Unfair competition: Injunction.

1. In an action to establish an exclusive right to manufacture and sell certain saw swages patented by defendant, and to enjoin him from manufacturing and selling similar machines in violation of his contract under which plaintiff claims, the defendant's wife, who is the record owner of the patent, is a proper, if not a necessary, party. *Phœnix Mfg. Co. v. White*, 287

2. The inventor of a saw swage gave to a corporation, by contract, an exclusive right to manufacture and sell such swage, together with the inventions and improvements on the same which had been or might be invented. Afterwards the patent on the swage was formally transferred to the inventor's wife, but without consideration and without intention to make any practical difference in the ownership and control thereof by the husband. A new contract, signed by the wife and differing in some respects from the former one, was then made with the corporation, which in terms declared that it should supersede all other and former contracts respecting such swage. Thereafter the manufacture and sale went on as before, royalties being paid to the wife, with the husband's knowledge, and deposited to the credit of a bank account in her name, upon which, however, checks were drawn by husband and wife indiscriminately. *Held*, that the second contract was to all intents and purposes the contract of the inventor, so far as the corporation was concerned, and that it superseded the earlier contract. *Ibid.*

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3. A new saw swage invented and patented by the same inventor, but designated in the specification of the patent as an improvement on the former machine and so treated by the parties for a number of years, was an "improvement" covered by the contracts giving the corporation exclusive rights of manufacture and sale. *Ibid.*

4. The inventor having invented a third saw swage of similar character but with some changes, and the corporation having, after some discussion and negotiation, agreed that he might manufacture and sell such new swage himself, and having allowed him thereafter to proceed to make patterns and models in its shop at a considerable cash outlay, paid to it by him, with full knowledge of his intention to use such patterns and models in a shop of his own in manufacturing the new swage, the corporation was estopped from claiming any right, by virtue of its contract, to manufacture and sell such third swage. *Ibid.*

5. A man's name is his own property and he has the right to every honest and fair use of it in his business, but he cannot resort to artifice or use it in such manner as to mislead the public in respect to the identity of another business firm or establishment or the article produced by it, and thus cause injury to such other beyond that which results from the mere similarity of name. *Ibid.*

6. Thus, where a man named White invented a saw swage and granted to plaintiff the exclusive right to manufacture and sell the same and any improvements thereon, and plaintiff had, with his knowledge and consent, put such invention and an improved form thereof upon the market under the names of the "White Swage," "New White Swage," and "Improved White Swage," and had at great expense and by efforts extending over a number of years established a reputation and demand for the article, such inventor was properly enjoined, at the instance of the plaintiff and upon proof of actual injury to its trade by deception of customers, from advertising and selling another swage of his own later invention under such names or any combination thereof, including the name "New Improved White Swage." *Fish Bros. W. Co. v. La Belle W. Works*, 82 Wis. 546, explained and distinguished. *Ibid.*

PAYMENT.

Application of payments. See PLEDGES, 5, 6.

The rule governing the presumption of application of payments will not be applied to work injustice. *Curry v. Wis. Nat. Bank*, 413

PERSONAL INJURIES. See ABATEMENT AND REVIVAL. ACTION, 2. APPEAL, 29. AUTOMOBILES. BRIDGES. COMPROMISE AND SETTLEMENT, 2. DAMAGES, 2, 5, 7. EVIDENCE, 1, 2. HIGHWAYS. INSTRUCTIONS TO JURY, 3, 4, 9–11. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 23–29. NEGLIGENCE. RAILROADS. RELEASE. STATUTES, 2. STREET RAILWAYS, 1, 3. TRIAL, 1–3, 12–16. WITNESSES.

PHYSICIANS AND SURGEONS. See INSURANCE, 14. PRINCIPAL AND AGENT. WITNESSES.

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PLEADING.

General rules. See STATUTES, 1, 4, 7.

Complaint. See ABATEMENT AND REVIVAL, 2. APPEAL, 3, 4. BRIDGES. HUSBAND AND WIFE. MASTER AND SERVANT, 3.

Answer. See APPEAL, 3. EXECUTORS AND ADMINISTRATORS, 5. PLEADING, 2.

Counterclaim. See TAXATION, 12.

[1. Whether a defendant can plead a counterclaim, pay no further attention to it and ask no relief thereon from the court below, and then have relief on an appeal from the judgment because the court disregarded the counterclaim or refused relief upon it, not determined.] *Radford v. Smith,* 163

2. In an action to foreclose a mortgage, an answer alleging that plaintiff had agreed that he would not bring such an action without giving notice of his intention so to do, and "that the defendants' damages by reason of the failure to give them reasonable notice of intention to bring this action as plaintiff agreed to do is $200, and the same is pleaded as a counterclaim against the plaintiff's demand upon the note and mortgage in suit," does not properly plead a counterclaim. *Ibid.*

Demurrer. See APPEAL, 3, 4, 33. BRIDGES.

Amendment.

3. An amendment which does not state facts showing an actionable tort does not change a complaint from one on contract to one in tort. *Francois v. Cady Land Co.* 115

PLEDGES.

1. In an action by the true owner to recover negotiable bonds pledged to a bank by one whose title was defective, the burden of proof is upon the defendant to show that it acquired the title in due course, which includes proof that it paid out the money agreed to be paid therefor or parted irrevocably with a valuable consideration. *Curry v. Wisconsin Nat. Bank,* 413

2. As between the true owner of the negotiable paper in such a case and the pledgee, the right of the latter to enforce the security is governed by the same rules of law as the right of a purchaser or indorsee of like paper; but the titles acquired are different, since where the innocent purchaser obtains an absolute title the innocent pledgee, up to the time of sale of the pledge, acquires only a lien. *Ibid.*

3. A reserve bank which credited its correspondent bank with the proceeds of a personal note given by an officer of the latter and secured by bonds of a customer which he had wrongfully taken, had in addition to the security of such bonds a bankers' lien enforceable by setoff against the credit balance of said correspondent bank for the sum so wrongfully credited. *Ibid.*

4. The pledgee bank did not in such case become a holder of the bonds in due course by the mere crediting of the proceeds of the note, nor by subsequent payment of drafts of the correspondent bank to an aggregate amount exceeding the entire credit balance at the time of the pledge, where such balance was

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augmented from time to time by additional deposits so that it never fell below the amount of such wrongful or mistaken credit. *Ibid.*

5. The subsequent sending to and acceptance by the correspondent bank of a "reconcilement sheet" showing the debit and credit items appearing upon the books of the reserve bank, including the erroneous credit and the then existing credit balance, did not change the situation nor amount to an irrevocable application of the debit items to the payment of the credits thereon appearing. *Ibid.*

6. Where, in the case stated, the pledgee bank, when it received notice of the defect in the pledgor's title to the bonds, had and at all times had had in its possession a credit balance due the correspondent bank in excess of the credit given on account of the wrongful pledge, it had the right, and it was a duty which it owed the true owner of the bonds, to revoke such credit and enforce its right of offset by cross-entry or otherwise. *Ibid.*

POLICE POWER. See MUNICIPAL CORPORATIONS, 10–12. TELEGRAPHS AND TELEPHONES, 7.

POURPRESTURES. See WATERS AND WATERCOURSES, 1–4.

POWER OF SALE. See MORTGAGES, 6, 7.

PREJUDICE OF JUDGE. See CRIMINAL LAW, 8.

PRELIMINARY INJUNCTION. See INJUNCTION.

PRESUMPTIONS. See APPEAL, 15–17, 35. BILLS AND NOTES. MASTER AND SERVANT, 11. PAYMENT. TRIAL, 17. WILLS, 1.

PRINCIPAL AND AGENT.

See ARSON, 3. BROKERS. CONTRACTS, 1, 3–5.

A minor son has no implied authority to employ physicians, at the expense of his father, to attend a person run over and injured by the son while using the father's automobile for his own pleasure or convenience, especially where the injury was purely accidental and without fault on the part of the son. *Habhegger v. King,* 1

PRINCIPAL AND SURETY. See OFFICERS.

PRIVATE STATUTE. See JUDGES, 5.

PROMISSORY NOTES. See BILLS AND NOTES. BROKERS, 1.

PROSTITUTION. See MUNICIPAL CORPORATIONS, 1.

PROXIMATE CAUSE. See AUTOMOBILES, 3. RAILROADS, 4–6. TRIAL, 16.

PUBLIC IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 4–17.

PUBLIC UTILITIES.

See TELEGRAPHS AND TELEPHONES, 6, 7.

Discriminatory contracts: Validity.

1. In an action by a village to recover sums agreed to be paid by a power company under a contract, stated in the opinion, the evidence is *held* to sustain a finding by the trial court that the contract was in fact one for the furnishing of free power to the village,—the provisions by which the village agreed to pay for the power and the company agreed to pay certain sums to the

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village being inserted as a subterfuge and for the purpose of evading the public utilities law. *Kilbourn City v. Southern Wis. Power Co.* 168

2. A municipal corporation which obtains its power for the operation of a municipal water and light plant from a public utility of this state stands upon the same footing as any private consumer, and under the public utilities act (ch. 499, Laws of 1907) cannot lawfully contract, directly or indirectly, for a more advantageous rate than other patrons are charged for like service. *Ibid.*

3. A discriminatory contract is not rendered valid by the fact that it is entered into before the public utility has completed its plant or commenced to do business as such. *Ibid.*

4. The matter of regulating rates of charge by public-service corporations and preventing discriminations is a governmental function and one over which the legislature has a right to legislate within constitutional lines, and any contract, not made under direct legislative authority, which runs counter to a valid law in this regard becomes superseded thereby, although made before the law was enacted. *Ibid.*

5. The public utilities act condemns all subterfuges whereby one consumer is called upon to pay a greater or lesser rate than that contained in the published schedule of charges, or whereby one consumer obtains a preference or advantage over another; and the regular schedule of rates cannot be departed from by making a contract which recites a consideration for the departure. *Ibid.*

6. The rule that where a contract has been executed by one party, the other party, having received the benefit thereof, is estopped from asserting its invalidity even though it was *ultra vires* when made, has no application to a contract made in violation of a statute and hence in contravention of the lawfully declared public policy of the state. *Ibid.*

7. Under secs. 1797*m*—27, 1797*m*—105, subd. 2, and 1797*m*—31 of the public utilities act, requiring schedules of rates to be filed with the railroad commission, and sec. 1797*m*—33, making it unlawful for a public utility "to demand, collect or receive any rate, toll or charge not specified in" the schedule of rates so required to be filed, it is the duty of a public utility to fix schedules of rates for the services it proposes to render, and file the same, before the services are performed, and it cannot recover for any service except as such service is covered by rates so filed. *Ibid.*

PUNITORY DAMAGES. See DAMAGES, 1. MUNICIPAL CORPORATIONS, 21.

QUIETING TITLE. See DEEDS, 5.

RAILROADS.

Injuries to passengers.

1. A finding by the jury that plaintiff, who had boarded a train at the rear end of the tender, was pushed therefrom by the baggageman, is *held* to be sustained by the evidence. *Walsh v. Chicago & N. W. R. Co.* 119

Injuries to employees. See STATUTES, 2.

2. Where the fireman on an engine, while leaning out of the cab to view the track ahead, was hit by the arm of a mail crane,

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and thereby the outer plate of his skull was fractured, while the inner plate, only about one sixteenth of an inch therefrom, was not broken, undisputed evidence that the arm of the crane was one inch lower than the standard prescribed by law was sufficient to sustain a finding by the jury that defendant was negligent, regardless of whether there was any conflict in the evidence as to the amount of clearance between the side of the train and the end of the arm. *Rowlands v. Chicago & N. W. R. Co.* 51

3. There being evidence in such case that plaintiff had no knowledge of the mail crane and had not before fired on a mail train passing that point in the daytime, and that when firing on freight trains his attention would not be called to the danger because the arm of the crane was turned away when not in use, the questions of assumption of risk and contributory negligence were for the jury. *Ibid.*

Same: Comparative negligence.

4. Findings by the jury in this case, that a switchman who failed to transmit to the engineer a signal to stop given by his foreman was guilty of a want of ordinary care proximately contributing to the injury and death of the foreman, who was crushed between the drawbar of a moving car and that of a standing car to which the train was being coupled, and that the negligence of the switchman was greater than that of the foreman, are *held* to be sustained by the evidence. *Tidmarsh v. Chicago, M. & St. P. R. Co.* 590

5. Under sec. 1816, Stats. (Laws of 1907, ch. 254), it is error to refuse, upon request, to submit to the jury in explicit language the basic question upon which the statutory liability depends, namely, whose negligence contributed in a greater degree to produce the injury, unless that question can be answered as a matter of law by the court. *Ibid.*

6. Findings by the jury that the injured employee and the defendant were each guilty of negligence, that the negligence of each contributed to produce the injury, and that the negligence of the defendant was greater than that of the employee, were not equivalent to a finding that defendant's negligence contributed in a greater degree to produce the injury. *Ibid.*

7. *Jensen v. Wis. Cent. R. Co.* 145 Wis. 326, distinguished and limited. *Ibid.*

RATES. See PUBLIC UTILITIES, 4, 5, 7.

RATIFICATION. See BROKERS, 3. EXECUTORS AND ADMINISTRATORS, 10.

REAL PROPERTY. See ARSON. CONTRACTS, 2–5. CORPORATIONS, 2. DEEDS. DRAINS. EQUITY, 2. EXECUTORS AND ADMINISTRATORS, 6–10. INJUNCTION, 4, 5. INSURANCE, 5, 6, 8. LANDLORD AND TENANT. MORTGAGES. RELIGIOUS SOCIETIES. VENDOR AND PURCHASER. WATERS AND WATERCOURSES.

REBUTTAL. See APPEAL, 28. TRIAL, 4.

RECEIVERS. See PARTNERSHIP, 2.

RECOGNIZANCES. See BAIL.

REFERENCE. See APPEAL, 19.

REFERENDUM. See CONSTITUTIONAL LAW, 3.

REFORMATION OF INSTRUMENTS. See INSURANCE, 6.

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RELEASE.

See COMPROMISE AND SETTLEMENT.

An instrument under seal whereby an injured person, in consideration of sums paid to him, released one of two joint wrongdoers from all actions, claims, and demands on account of the injury, and covenanted not to sue that one, but stated that it was expressly understood that said sums were received not as an accord and satisfaction for the whole injury suffered, but only as a part satisfaction thereof, is construed, in accordance with the manifest intention, not to be a technical release within the rule that a release of one joint wrongdoer releases all, but to be merely a covenant not to sue; and, so construed, it is not a bar to an action against the other wrongdoer. *Kropidlowski v. Pfister & Vogel Leather Co.* 421

RELIGIOUS SOCIETIES.

1. Where property is conveyed to a religious society, or to trustees for its use, for the promotion of the doctrines and discipline of some particular denomination, courts will prevent its diversion to the support of a different and inconsistent denomination, if even a single individual legally interested objects. *Martin v. Board of Directors,* 19
2. The fact that the society was not incorporated at the time the property was granted to it does not impair the trust thereby intended, if the legal title was granted to the trustees or members of such society. *Ibid.*
3. A conveyance of land for church and cemetery purposes to "The trustees of the Protestandisch Evangelisch Church and their successors in office" constituted a definite and clear grant of the property to the organization so named, and upon its subsequent incorporation the title vested in the trustees in trust for the uses and purposes for which it was conveyed and held before such incorporation. *Ibid.*
4. The evidence in this case (stated in the opinion) is *held* to show, contrary to the findings of the trial court, that the church society of which the defendants are officers was organized and has continued to the present time as an independent religious organization; that it received grants of its property for a church, a cemetery, and a parsonage as such an independent society, and holds the same in trust for such uses; that it was at no time a Reformed church, and did not become legally affiliated with the Milwaukee Classis of the Reformed Church; and that the management and control of the temporalities are vested in its board of trustees and the members of the congregation, pursuant to its articles of incorporation. *Ibid.*

REPEAL of statute. See STATUTES, 5, 6.

RESCISSION. See COMPROMISE AND SETTLEMENT. DEEDS, 9.

RESERVATIONS. See DEEDS, 11–13.

RES GESTÆ. See EVIDENCE, 1.

RES JUDICATA. See APPEAL, 29. DIVORCE, 2–4.

RESULTING TRUSTS. See EXECUTORS AND ADMINISTRATORS, 9.

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RIGHT OF WAY. See DEEDS, 12, 13.

RIPARIAN RIGHTS. See WATERS AND WATERCOURSES, 1–4.

RIVERS. See STATES. WATERS AND WATERCOURSES, 6.

RULES OF COURT.
Circuit Court Rule XXXIII (Motion for new trial), 97, 105.

SALARY. See JUDGES.

SALES. See BROKERS. DAMAGES, 3, 4.

SELF-DEFENSE. See CRIMINAL LAW, 2.

SEPARATE TRIALS. See CRIMINAL LAW, 9, 10.

SETOFF. See PLEDGES, 3.

SETTLEMENT. See COMPROMISE AND SETTLEMENT. RELEASE.

SHERIFFS.

Duties and liabilities: Arrest and bail: Escape. See CONSPIRACY, 6.

1. A sheriff having a warrant to arrest and hold to bail, is in duty bound to, with reasonable promptness, arrest the defendant and retain him in official custody until released on bail according to the warrant, or otherwise in due course of law, or by consent of plaintiff. *Gebhardt v. Holmes,* 428

2. Failure of duty to make the arrest in the circumstances stated, renders the officer liable to the plaintiff for the pecuniary loss sustained. *Ibid.*

3. Failure of duty as to retention in official custody, barring disturbance beyond human control, results the same. *Ibid.*

4. In case the officer suffers an escape, whether voluntary or involuntary, he is responsible to the plaintiff within the limitations stated.

5. An officer may, at his peril, allow a defendant in arrest under mesne process freedom from official restraint, provided he produces him upon the return day of the writ or time equivalent thereto. *Ibid.*

6. If an officer, in the circumstances stated, suspends official custody for any time, whereby he becomes unable to produce the defendant as stated in No. 5, he incurs liability for the legal damage to plaintiff, dischargeable only by payment. *Ibid.*

7. A sheriff may entrust execution of a warrant to an official assistant, subject to personal responsibility for that assistant's conduct as if it were his own. *Ibid.*

8. An officer having executed a warrant to arrest and hold to bail, by taking the defendant into custody, commits an actionable breach of duty by entrusting, as matter of favor or convenience, the prisoner to nonofficial control. *Ibid.*

9. In the circumstances stated in No. 8, the instant official custody of the person is broken, an actionable escape will have occurred. *Ibid.*

10. In case of official custody being broken as suggested in the foregoing, and there being an escape effected, there cannot be a subsequent escape without a new actual arrest. *Ibid.*

11. An escape is effected in the circumstances stated, upon the principle that legal custody exists only when the custodian has a right under the warrant to possession of the prisoner. *Ibid.*

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12. Resulting from the rule stated in No. 11, upon an officer leaving his prisoner with a person having no right under the warrant to possess him, an escape is effected,—an actionable breach of official duty. *Ibid.*

13. It being the duty of an officer having a person in custody to maintain the same till terminated by due course of law, an agreement with a nonofficial custodian to produce the prisoner into official custody at some later time, is in violation of law. *Ibid.*

14. An agreement in plain violation of law, is void and so unenforceable by judicial remedies, regardless of whether it involves a breach of moral obligation. *Ibid.*

15. The statutes, secs. 2697 to 2706, Stats. (1898), governing the proceedings in respect to the execution of a warrant to arrest and hold to bail, and sec. 2712, providing that, if the prisoner after having been arrested shall not have given bail or be produced in due course, the officer shall be deemed guilty of an escape and be, himself, liable as bail, in effect prohibits such officer from allowing his prisoner to go from his official custody except as provided by the written law. *Ibid.*

16. Where an officer, in breach of his duty, leaves his prisoner in nonofficial custody under an agreement that the custodian will produce him, the agreement is illegal, therefore void; hence an executed combination to breach it does not constitute a legitimate foundation for an action for damages for conspiracy. *Ibid.*

17. Under the Michigan statute (sec. 8912, How. Ann. Stats. 1882) the jail limits in that state are the boundaries of the county in which the jail is situated. *Ibid.*

18. At common law and under the Michigan statute (sec. 8919, How. Ann. Stats. 1882) a person arrested on mesne process may be permitted to have jail liberties without bond, at the risk of the officer, and so long as he remains within the jail limits he continues to be in official custody; but if he goes outside of such limits without the consent of the person at whose suit he is under arrest it is an escape. *Ibid.*

SIDEWALKS. See MUNICIPAL CORPORATIONS, 20–29. TRIAL, 1.

SLANDER. See EVIDENCE, 4–7.

SPECIAL STATUTE. See JUDGES, 5.

SPECIAL VERDICT. See APPEAL, 24. INSTRUCTIONS TO JURY, 4. STREET RAILWAYS, 1. TRIAL, 10–15, 17.

STATES.

Boundaries: Navigable rivers: Jurisdiction.

1. The jurisdiction of a state for the enforcement of its fish and game laws is co-extensive with, and limited by, the boundaries of the state, even though they consist of the thread of a navigable stream over whose waters the adjacent states have concurrent jurisdiction for other purposes. *State v. Bowen,* 203

2. Where the boundary line between states is declared to be the center line or thread or middle of the main channel of a stream separating them, the conditions then existing govern as to what channel is meant; and the *then* channel, except as it may be changed by erosion or accretion, will forever contain within it

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the declared boundary line, though not necessarily in the same place at all times. *Ibid.*

3. Thus, no change in the boundary line between Wisconsin and Minnesota resulted from the construction of a dam which diverted the waters of the Mississippi river from the original main channel, east of a certain island, to a channel west thereof, although such western channel thereupon became the main channel and the only one navigable by steamboats. *Ibid.*

STATUTE OF FRAUDS. See BROKERS, 1. FRAUDS, STATUTE OF. MORTGAGES, 1. PARTNERSHIP, 1, 2.

STATUTE OF LIMITATIONS. See EXECUTORS AND ADMINISTRATORS, 2, 5. LIMITATION OF ACTIONS.

STATUTES.

Constitutionality. See INJUNCTION, 1, 2. INSURANCE, 11. JUDGES. MUNICIPAL CORPORATIONS, 10–12. PUBLIC UTILITIES, 4. TAXATION, 9. TELEGRAPHS AND TELEPHONES, 3, 4.

Special, private, or local statutes. See JUDGES, 5.

Mandatory or directory? See NEW TRIAL, 5.

State and federal: Judicial notice.

1. Acts of Congress are not foreign laws, and state courts take judicial notice of them; and, ordinarily, if the facts alleged in the complaint bring the case within a federal statute, that is sufficient without pleading the statute itself. *Rowlands v. Chicago & N. W. R. Co.* 51

2. In an action against a railway company for personal injuries, an allegation that at the time of the injury the plaintiff was employed by defendant as a fireman upon an engine running between Chicago and Milwaukee and hauling passengers, baggage, and mail, shows that he was engaged in facilitating interstate commerce and hence that his rights are referable to the federal Employers' Liability Act (35 U. S. Stats. at Large, 65, ch. 149, as amended April 5, 1910). *Ibid.*

3. As to such employees, the federal statute supersedes state statutes covering the same field. *Ibid.*

4. If in such case there was any informality about the pleading, as regards the statute, the remedy of defendant was by motion to make more definite and certain. *Ibid.*

Amendment and repeal. See JUDGES, 2.

5. Repeals by implication are not favored; and a general clause repealing all conflicting acts or parts of acts does not repeal other acts relating to the same general subject unless there is an actual conflict. *Milwaukee County v. Halsey,* 82

6. The fact that the legislature afterwards recognizes a law as being in force tends to show that it was not the intention to repeal it at a previous session; but is not conclusive. *Ibid.*

Foreign statutes. See EVIDENCE, 4–7. STATUTES, 1. TRIAL, 7.

7. A statute of another state, although not pleaded, is admissible in evidence to prove a material fact which is pleaded. *Gebhardt v. Holmes,* 428

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Construction. See ABATEMENT AND REVIVAL, 1, 3–5. ARSON, 1, 4. APPEAL, 5, 7, 12, 17, 30, 32. BAIL, 1, 4. BILLS AND NOTES. CRIMINAL LAW, 8. DIVORCE, 2–4. DRAINS. CHATTEL MORTGAGES, 2, 3. CONSTITUTIONAL LAW, 9, 11. EXECUTORS AND ADMINISTRATORS, 6, 7, 9. FRAUDS, STATUTE OF. INJUNCTION, 5. INSURANCE, 1–4, 9. JUDGES, 1–6. JUSTICES' COURTS, 1, 2. MORTGAGES, 6, 7. MUNICIPAL CORPORATIONS, 2, 3, 11, 12, 18, 23, 24. NEW TRIAL, 1, 5, 6. OFFICERS, 4, 5. PUBLIC UTILITIES, 2, 7. RAILROADS, 5. SHERIFFS, 15. TAXATION, 2–4, 6, 8. TELEGRAPHS AND TELEPHONES, 4–6. TOWNS, 2, 5. WILLS, 11–13. WITNESSES, 1, 3.

8. Where a statute is fairly susceptible of two constructions, that one is to be preferred which will leave it valid and constitutional, rather than one which defeats it. *Milwaukee County v. Halsey,* 82

STIPULATIONS. See TRIAL, 7–9.

STREET RAILWAYS.

Wrongful ejection of passengers.

1. In an action for the wrongful ejection of a passenger from a street car, a finding of the special verdict that plaintiff's conduct was not such as to justify the conductor in ejecting him is not inconsistent with a finding that he was not ejected under circumstances of aggravation or cruelty, with vindictiveness or malice; hence there is no such conflict in the verdict as requires a new trial. *Di Benedetto v. Milwaukee E. R. & L. Co.* 566

2. The evidence being conflicting, the jury were not bound to believe the statements of either of the participants in their entirety. *Ibid.*

Injuries to passengers: Contributory negligence. See EVIDENCE, 1, 2.

3. It was, in this case, negligence as a matter of law for plaintiff to attempt to board the front vestibule of a moving street car after it had stopped at a usual stopping place and had started again and was being speeded up, it appearing, among other things, that the vestibule door was closed and locked and that it was evident to the plaintiff that the motorman either did not see his signals or did not intend to pay any attention to them. *Sigl v. Green Bay Traction Co.* 112

STREETS. See APPEAL, 2. MUNICIPAL CORPORATIONS, 4–29. TELEGRAPHS AND TELEPHONES, 5.

SUNDAY. See MASTER AND SERVANT, 18.

SUPREME COURT. See APPEAL. COURTS.

SURETY COMPANIES. See OFFICERS, 1.

SURVIVAL OF ACTIONS. See ABATEMENT AND REVIVAL. MUNICIPAL CORPORATIONS, 24.

TAXATION.

Uniformity of rule. See JUDGES, 7.

Liability of property: Ice.

1. Ice cut and stored in an ice house is a commodity and is assessable as personal property. *State ex rel. Lake Nebagamon Ice Co. v. McPhee,* 76

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2. The omission, in the later amendments to sec. 1040, Stats. (by ch. 191, Laws of 1901, and ch. 70, Laws of 1909), of the specific reference to "ice cut and stored" which had been inserted in that section by ch. 346, Laws of 1899, did not indicate an intention to exempt such ice from taxation, because sec. 1036, Stats. (Laws of 1899, ch. 346), classifying such ice as personal property, and the broad requirements of sec. 1040 as to the assessment of all personal property, remained unchanged. *Ibid.*

3. Such ice is to be assessed in the district where located, under the third sentence of sec. 1040, Stats. (Laws of 1909, ch. 70), if kept there for sale, even though the owner resides in another district and negotiates sales in that other district, making shipments by rail from the place where the ice is located to purchasers in other parts of this state or in other states. *Ibid.*

4. If not kept for sale in the district where located, such ice is nevertheless taxable in that district, under the fifth sentence of sec. 1040, Stats. (Laws of 1909, ch. 70). *Ibid.*

Same: Assessment of omitted property: Executors.

5. In an action to restrain the collection of a tax entered against executors upon a reassessment of property of a decedent omitted from the tax rolls of previous years, the burden is upon the executors to show whether the property so reassessed was omitted property or merely undervalued property, since the tax roll is under the statute *prima facie* evidence of the justice and regularity of the tax. *Bogue v. Laughlin*, 271

6. Sec. 1059, Stats. (Supp. 1906: Laws of 1899, ch. 50), and secs. 1044–1044*d* (Supp. 1906: Laws of 1903, ch. 417), authorized the property of a decedent, which had been omitted from assessment in previous years during his lifetime, to be assessed against his personal representatives. *Ibid.*

7. It is sufficient to justify such an assessment that the personal representatives have in their possession on May 1st personal property subject to taxation, and it is not necessary that it should be the identical property omitted or that the proof should show what specific items were omitted in the previous years. *Hayden v. Roe*, 66 Wis. 288, distinguished. *Ibid.*

8. Under the law as it has existed since 1903 (Laws of 1903, ch. 417), the tax or liability for a tax on personal property is a legal charge against the owner. *Ibid.*

9. The statute authorizing the assessment of omitted property against representatives of a deceased person is constitutional. *Ibid.*

10. The statute gives ample power to assess the omitted property against the personal representatives, and the tax then becomes their debt, though with the power to reimburse themselves out of the estate, and there is no necessity to present such tax in county court as a claim against the estate. *Ibid.*

11. An assessment which, from the whole record, was evidently intended to be made against executors, is sustained as such, though somewhat lacking in form. *Ibid.*

12. Where an action is brought by executors of a deceased person against a village and its treasurer to restrain the collection of taxes assessed against such executors, defendants may counter-

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claim for the amount of the tax, and it is immaterial that the prayer is for judgment against plaintiffs personally. The judgment on such counterclaim against the executors should be in form *de bonis testatoris*. *Ibid.*

Same: Exemptions. See TAXATION, 2.

Board of review: Notice: Waiver.

13. One who appears generally before a board of review in response to a notice issued by such board cannot afterwards object that such notice was not a six days' notice as required by statute. *Bogue v. Laughlin*, 271

Same: Evidence.

14. A mere opinion of the owner with reference to the value of personal property, unsupported by facts or circumstances and coupled with evasive answers as to the quantity and market value, does not so nullify the valuation of an assessor that the board of review is without jurisdiction to confirm the latter. *State ex rel. Lake Nebagamon Ice Co. v. McPhee*, 76

TELEGRAPHS AND TELEPHONES.

Telegraph companies: Negligence: Mental anguish.

1. In an action against a telegraph company to recover damages for mental anguish resulting from negligent failure to deliver a message in time to enable plaintiff to attend the funeral of his father, the plaintiff testified: "I felt awful sorry because I could not get over there." It also appeared that he had gone into the woods to work, and thereafter made two visits to his home to see his sick father. *Held* sufficient to sustain a recovery of $350. *Nitka v. Western Union Tel. Co.* 106

2. An impromptu answer of the plaintiff to an oral interrogatory in an examination had prior to the trial, that he would not take $100 and miss his father's funeral, and other answers to the same effect, though admissible in evidence, were not conclusive upon him so as to preclude a recovery of more than $100. *Ibid.*

3. A legislative classification by which special duties or special liabilities are imposed upon persons or corporations engaged in the business of receiving, transmitting, and delivering messages by telegraph, is justified by the substantial differences between that business and others, including the business of operating telephone lines. *Ibid.*

4. A statute (sec. 1778, Stats.: Laws of 1907, ch. 165) providing that any person, association, or corporation operating or owning any telegraph lines doing business in this state shall be liable for damages for mental anguish resulting from failure or negligence in receiving, copying, transmitting, or delivering messages, is valid. It does not deprive any one of property without due process of law, or deny the equal protection of the laws, in violation of the XIVth amendment to the federal constitution or of the equivalent provisions in the state constitution. *Ibid.*

Telephone companies: Franchise: Public utility law.

5. An attempted grant of a franchise by a city to a telephone company is inoperative and void, since the franchise conferred

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upon such a company, when it is incorporated, by sec. 1778, Stats., gives it full authority to construct its lines upon the public highways of the state and the streets of municipalities, subject only to reasonable regulations under the police power. *Kenosha v. Kenosha Home Telephone Co.* 338

6. Even if valid at its inception, a franchise theretofore granted by a city to a telephone company was repealed by the public utility law (Laws of 1907, ch. 499), in so far as it conflicted therewith. *Ibid.*

7. A city ordinance purporting to grant a franchise to a telephone company and requiring the company in consideration thereof to furnish a certain number of free telephones for the city, cannot be considered as a contract. The city in such case, in its proprietary right, had no consideration to give for such a contract, for it cannot barter the exercise of its police power for free telephones; and as a state agency the city had no power to enter into a contract not subject to amendment by the public utility law. *Superior v. Douglas Co. T. Co.* 141 Wis. 363, distinguished. *Ibid.*

TEMPORARY INJUNCTION. See INJUNCTION.

TENDER. See CHATTEL MORTGAGES, 4.

TOWNS.

Powers of town board: Contracts: Validity: Road machinery.

1. In an action upon a town order for $200 given in part payment for a road roller and two road machines, a stipulation by the parties reciting, among other things, that defendant had tendered $150 in payment of the order, which tender was refused, and that "defendant has been at all times and is now ready to pay for the road machine and the road roller delivered to district No. 26" (representing $150 of the order), was an admission of every fact essential to a valid cause of action, and the town cannot successfully claim that the order was not a legal obligation against it to the extent stated. *Indiana Road Machine Co. v. Lake,* 541

2. A contract between the town board of an organized town of this state and a foreign corporation which has not complied with the provisions of sec. 1770*b*, Stats. (Supp. 1906), for the purchase of a rock crusher previously shipped into the state and delivered to the consignee, who was the town chairman, did not involve any transaction of interstate commerce and is void. *Ibid.*

3. In such case, a town order issued to the foreign corporation in part payment of the purchase price is also void. *Ibid.*

4. A town board has no power, without express statutory authority, to purchase expensive machinery, such as a rock crusher, to be paid for by tax levies after their terms of office expire. *Ibid.*

5. Subd. 2, sec. 1223, Stats. (Supp. 1906: Laws of 1899, ch. 83, sec. 1), which authorizes town boards "to purchase machinery, implements, stone," etc., "on such terms as may seem proper," does not confer unlimited power to purchase at their discretion, but, when read in connection with other statutes, means merely that they may so purchase when the electors have made pro-

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vision to meet the expenditure and have in fact or in effect authorized it. *Ibid.*

TOY PISTOLS. See NEGLIGENCE, 2.

TRADE-NAMES. See PATENTS.

TRESPASS. See LANDLORD AND TENANT. MUNICIPAL CORPORATIONS, 22.

TRIAL.

Course and conduct in general. See CRIMINAL LAW, 8–16.

Reception of evidence. See APPEAL, 11, 28. ARSON, 2–4. BRIDGES. CRIMINAL LAW, 1–7.

1. It was error to admit testimony of the plaintiff to the effect that her attending physician had told her she had ribs broken by the accident; but such error was not prejudicial where the physician, as a witness, described the injuries in detail and said that he did not know whether any ribs were broken, and there were other serious injuries, and the damages awarded were not excessive. *Johnson v. Iron River,* 139
2. It was not error to admit evidence that there was ice on the highway at the point in question, to explain the slipping of the horse. *Ibid.*
3. It being admitted that plaintiff's intestate was caught in the gearing of the defendant's mill and that he died as a result of the injuries received, evidence as to the distressing condition of his body after the machinery was stopped should not have been received. *West v. Bayfield Mill Co.* 145
4. Where evidence offered on rebuttal is not of new matter, but merely to explain or make more clear evidence previously given, the trial court has a very broad discretion as to its admission. *Barlow v. Foster,* 613

Arguments and conduct of counsel.

5. A statement by plaintiff's counsel, in opening his case to the jury, that defendant's counsel had "said last night that he had a witness who would testify that the persons in the vehicle in question were intoxicated," is not ground for reversal, even though defendant's counsel did not make the remark attributed to him in the presence of the jury. *Johnson v. Iron River,* 139
6. Plaintiff's counsel asked some questions to which objection was made and sustained, and in answer to an inquiry by the court said that he wished to prove that plaintiff, at or soon after the time of her injury, said to her son-in-law that she wished to go home because she thought she was going to die. The jury was instructed to disregard this statement. *Held,* that there was no prejudicial error. *Ibid.*

Taking case or question from jury. See MASTER AND SERVANT, 8, 10. MUNICIPAL CORPORATIONS, 9. RAILROADS, 3.

7. The question of what a foreign law is, is always a question of fact; and when in a trial by jury a decision of that question must be made on conflicting oral testimony the question should be submitted to the jury unless the parties stipulate that it be decided by the court. *Hite v. Keene,* 207
8. If such a stipulation be made, the trial court should make and file specific findings or conclusions of law upon the issues so to

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be determined by it, in order that the judgment may have a proper foundation. In this case, it not being clear that the trial court has found sufficient facts to warrant the entry of a judgment, the judgment entered is reversed and the cause remanded with directions to that court to make formal findings and enter judgment thereon unless of the opinion that a new trial should be granted. *Ibid.*

9. A motion for a directed verdict by both parties is not equivalent to a stipulation that all the issues be disposed of by the court. *Ibid.*

Instructions to jury. See APPEAL, 27. AUTOMOBILES, 2, 4, 5. CRIMINAL LAW, 16. INSTRUCTIONS TO JURY. JURY. TRIAL, 16.

Same: Requests for instructions. See INSTRUCTIONS TO JURY, 3, 7–9. RAILROADS, 5.

Deliberations of jury. See JURY.

Verdict. See TRIAL, 9–12, 15, 17.

Special verdict. See APPEAL, 24. INSTRUCTIONS TO JURY, 4. STREET RAILWAYS, 1.

10. On appeal a party cannot complain of the failure of the trial court to submit in a special verdict a question as to a special issue, where he did not request such submission and it would be inconsistent with his theory of the case as presented below. *Schmidt v. Milwaukee,* 367

11. In case of a special verdict respecting two defendants, in circumstances where either or both may be liable, and a negative, resulting in nonliability as to one, which likewise exonerated the other, and so omits to answer a following vital question as to such other, and the court changes the finding as to the controlling question, the cause should not be concluded as to such other without such omitted matter being passed upon. *Gebhardt v. Holmes,* 428

12. Where several grounds of negligence are alleged in the complaint, such of them as are not supported by evidence or are not relevant under the evidence as the facts finally appear therein may properly be dropped out of the case and omitted from the special verdict. *Lemke v. Milwaukee E. R. & L. Co.* 535

13. A special verdict specifically found defendant negligent upon two grounds alleged in the complaint. A similar finding upon a third ground was made in answer to a question which, in the absence of proper instructions, was too general, but no more appropriate question was suggested by defendant. There was also a general finding that defendant was guilty of a want of ordinary care which was the proximate cause of the accident. *Held,* that the last finding refers by fair implication to the two items of negligence specifically and properly found, and, no prejudice to defendant being shown, a judgment for plaintiff should not be reversed because of such informalities in the verdict. *Ibid.*

14. In an action for death caused by a collision between an electric car and a buggy, a question in the special verdict, "Was there a proper and sufficient headlight in use on such car at the time of the accident?" was faulty, in the absence of instructions as to the legal test of a proper and sufficient headlight, since the jury might set up a standard of its own in that particular. *Ibid.*

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15. Two questions in such special verdict, (1) "Was the gong or bell on the car which collided with the buggy sounded within a reasonable time before the accident?" and (2) "Was the car at and just prior to the accident run at an unusually rapid and dangerous rate of speed?" though imperfect, were fairly within the discretion vested in the circuit court with reference to the form of questions to be submitted. *Ibid.*

16. An instruction, in such case, that negligence is the proximate cause of an injury only when that injury is the natural and probable result of such negligence and when in the light of attending circumstances the injury ought to have been foreseen by a person of ordinary care and prudence, is approved. *Ibid.*

17. Although a question of a special verdict may be improper because embracing several propositions in the disjunctive, so that an affirmative answer does not indicate unanimous concurrence of the jurors upon any one of them, yet, where no error was assigned thereon and there was no request for separate questions, it will be presumed on appeal, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), that the trial court found in support of the judgment on the material issues not passed upon by the jury. *Jennings v. Johonnott,* 660

TRUSTS AND TRUSTEES. See EXECUTORS AND ADMINISTRATORS, 9. RELIGIOUS SOCIETIES.

ULTRA VIRES. See PUBLIC UTILITIES.

UNDERTAKINGS. See APPEAL, 5–7, 31. BAIL. JUSTICES' COURTS, 2, 3.

UNDUE INFLUENCE. See GIFTS, 1. WILLS, 3.

UNGUARDED MACHINERY. See APPEAL, 29. INSTRUCTIONS TO JURY, 11. MASTER AND SERVANT, 15.

UNLAWFUL DETAINER. See JUSTICES' COURTS, 2, 3.

VENDOR AND PURCHASER OF LAND.

See CONTRACTS, 3–5.

One who buys real estate of another while it is in possession of a third person takes with notice of all facts which such situation would suggest or which could be obtained by diligent inquiry. *Keilly v. Severson,* 251

VENUE. See CRIMINAL LAW, 8.

VERDICT. See TRIAL, 9–12, 15, 17.

VIADUCTS. See MUNICIPAL CORPORATIONS, 10–15.

VILLAGES. See PUBLIC UTILITIES.

WAIVER. See APPEAL, 3. CONTRACTS, 5. TAXATION, 13. WITNESSES, 2.

WATERS AND WATERCOURSES.

Lakes: Title to bed: Pourpresture: Accretion and reliction. See STATES.

1. Where the title to the bed of a lake is in the state one cannot, by building up land or erecting a pourpresture therein, acquire such title. *Menominee River Lumber Co. v. Seidl,* 316

2. If, by dredging, a riparian owner makes an embankment or island above the water in front of his land at a place below low-water

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mark, where the title to the bed of the lake is in the state, he acquires no title thereto, even though by reason of subsequent accretion or reliction his ownership may be extended over the space between his original shore line and such embankment or island. *Ibid.*

3. Where the title to the bed of a lake is in the state a riparian owner's right of access to deep water is an incorporeal right and cannot be recovered in ejectment. *Ibid.*

4. Where in ejectment a riparian owner, alleging that he had title in fee simple and was entitled to possession of the premises in question, sought to recover an embankment which had been raised above the water by dredging in front of his land, but was unable to show title thereto because such title was in the state, a judgment dismissing the complaint on the merits was proper. *Ibid.*

Artificial ponds: Change to natural conditions by lapse of time. See STATES, 3.

5. The artificial condition of a lake or stream, originally created by a dam, may by lapse of time become a natural condition. *Minehan v. Murphy,* 14

6. Evidence, stated in the opinion, is *held* to sustain a verdict to the effect that navigable water was a river, not a lake. *Ibid.*

Dams: Taking flooded lands: Other public uses.

7. A statute authorizing a dam to be raised to a specified height and to flood such lands as will be overflowed thereby carries by implication the right to take the lands so flooded, even though they are already devoted to another public use. *Kilbourn City v. Southern Wis. Power Co.* 168

WILLS.

Probate: Presumptions.

1. Recitals in the attestation clause of a will showing due execution thereof are presumed to be true and can only be overcome by clear and satisfactory evidence. *Will of Grant: Williams v. Malm,* 330

2. The testimony of witnesses as to the details of the attestation of a will more than twenty years before, contradicting their written statement made when they signed the instrument, is *held* in this case less convincing than the written statement itself. *Ibid.*

3. A will should not be lightly set aside where there is no question of mental incapacity or undue influence, and where there is no doubt that the testator intended to make and supposed that he had made a valid will. *Ibid.*

4. Upon evidence stated in the opinion it is *held*, contrary to findings by the trial court, that a joint will of husband and wife, the wife's signature to which appeared in the form of a mark, was properly executed by her. *Ibid.*

Construction. See APPEAL, 30.

5. The terms "residuum" and "residuary estate" properly mean what remains of a decedent's estate after debts and expenses are paid and particular legacies deducted. *Will of Stark,* 631

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6. If it appears, however, that a testator intended there should be a succession of residuums to be distributed from time to time, his intention in that regard should be carried out despite the usual significance of that term. *Ibid.*

7. With reference to the will here in question it is *held* that the testator had in mind but one residue, not a succession of them; that such residue could only be definitely determined, and hence distributed, when a bequest to a children's hospital was either earned or forfeited; and that the words "then living" had reference to that time and not to the time of testator's death. *Ibid.*

8. Where, as in this case, the scheme of the will can be carried out without the conversion of real property into money, the estate being ample to pay all specific legacies and demands without the sale of any realty, and the will provides explicitly for the sale of the homestead after death of the widow but makes no reference to any other sales, and the residuary clause applies to "all the rest, residue, and remainder of my property . . . both real and personal," the doctrine of equitable conversion cannot be applied so as to construe the will as dealing only with personal property. *Ibid.*

9. Where a will directs that taxes and repairs on the testator's homestead, which is devised to his widow for life, be paid from the residuary estate, these expenses must be paid from the personal estate before resorting to the real estate or the rents thereof. *Ibid.*

10. No specific directions having been given for disposition of the income arising from real estate and personalty included in the residuary estate, the testator must be deemed to have directed that it accumulate until the time when such residuary estate is to be distributed. *Ibid.*

11. As to the income from the personal estate such accumulation is permitted, but secs. 2060–2063, Stats. (1898), do not permit accumulations of the rents and profits of real estate except for certain specific purposes and uses which are not present here. *Ibid.*

12. Under sec. 2064, Stats. (1898), therefore, the rents and profits of real estate must go and should be distributed annually to the persons entitled to the next eventual estate. *Ibid.*

13. Such persons in this case are, until the residuary legatees become absolutely fixed by the earning or forfeiting of the hospital bequest, the living nephews and nieces of the testator whose estate in expectancy fulfils all the calls of said sec. 2064. *Ibid.*

14. While the word "securities" construed strictly does not cover corporate stock, but rather bonds or evidences of debt, it is generally used in a broader sense and as embracing certificates of stock. *Ibid.*

15. Where the testator, who owned both stocks and bonds, bequeathed to his wife $25,000 in cash or, at her election, "*securities* . . . of said amount of $25,000 *at par value*," she was entitled to take bank stocks at their face value, although they were actually worth much more. *Ibid.*

16. The word "child" in a will may sometimes be construed as applying to a grand-child, and "nephew" may be held to cover grand-nephew, but only when the evident purpose of the testator demands such a construction. *Ibid.*

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17. Bequests to "children" of testator's brothers and sisters and to "nephews and nieces" living at the time of his death are *held*, in this case, not to include the son of a nephew who died before the testator, especially in view of the facts that the will was drawn with much care and great precision of expression and that in other instances provision is expressly made therein for the children of a legatee to take in case of the latter's death. *Ibid.*

WITNESSES.

Competency: Physicians.

1. A physician for a street railway company, who was called to attend an injured passenger and who acted as her attending physician, was incompetent under sec. 4075, Stats. (1898), to testify to information acquired while acting in that capacity, as to the nature and extent of her injuries, for the purpose of showing that such injuries were not serious and that plaintiff was endeavoring to perpetrate a fraud upon the company. *Cohodes v. Menominee & Marinette L. & T. Co.* 308

2. Although plaintiff herself testified concerning her condition and the nature and extent of her injuries, she did not thereby waive her rights under said statute. *Ibid.*

3. The provisions of said sec. 4075, Stats. (1898), are in no way relaxed in such a case by the later legislation requiring physicians to file death certificates in a public office and to make report of certain accident cases to local registers of vital statistics. *Ibid.*

WORDS AND PHRASES.

Adult owners, in statute. See DRAINS.
Change of venue, in statute. See CRIMINAL LAW, 8.
Child, in will. See WILLS, 15, 16.
Compensation, in constitution. See JUDGES, 1.
Condition to be performed, in statute. See DIVORCE, 4.
Convicted, in statute. See MUNICIPAL CORPORATIONS, 3.
Deposit of money in lieu of sureties, in statute. See BAIL, 1.
Entirely disabled, in instructions to jury. See INSTRUCTIONS TO JURY, 6.
Excepting, in deed. See DEEDS, 11.
Improvement, in contract. See PATENTS, 3.
In such a manner, in instructions to jury. See INSTRUCTIONS TO JURY, 11.
Landlord, in municipal ordinance. See MUNICIPAL CORPORATIONS, 1.
Lot, in city charter. See MUNICIPAL CORPORATIONS, 5, 6, 8.
Moneys received by virtue of his office. See OFFICERS, 4.
Nephew, in will. See WILLS, 15, 16.
Nonresident alien. See MUNICIPAL CORPORATIONS, 24.
Par value, in will. See WILLS, 15.
Party injured, in statute. See ABATEMENT AND REVIVAL, 3.
Property. See PATENTS, 5.
Rashly, recklessly, and wantonly, in instructions to jury. See AUTOMOBILES, 5.
Reserving, in deed. See DEEDS, 11.
Residuary estate—Residuum, in will. See WILLS, 5, 6.
Securities, in will. See WILLS, 14, 15.
Then living, in will. See WILLS, 7.
Void, in statute. See EXECUTORS AND ADMINISTRATORS, 7.
Wilfully, in instructions to jury. See AUTOMOBILES, 4.

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